TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 163.

THE VIRGINIAN RAILWAY COMPANY, PETITIONER,

vs.

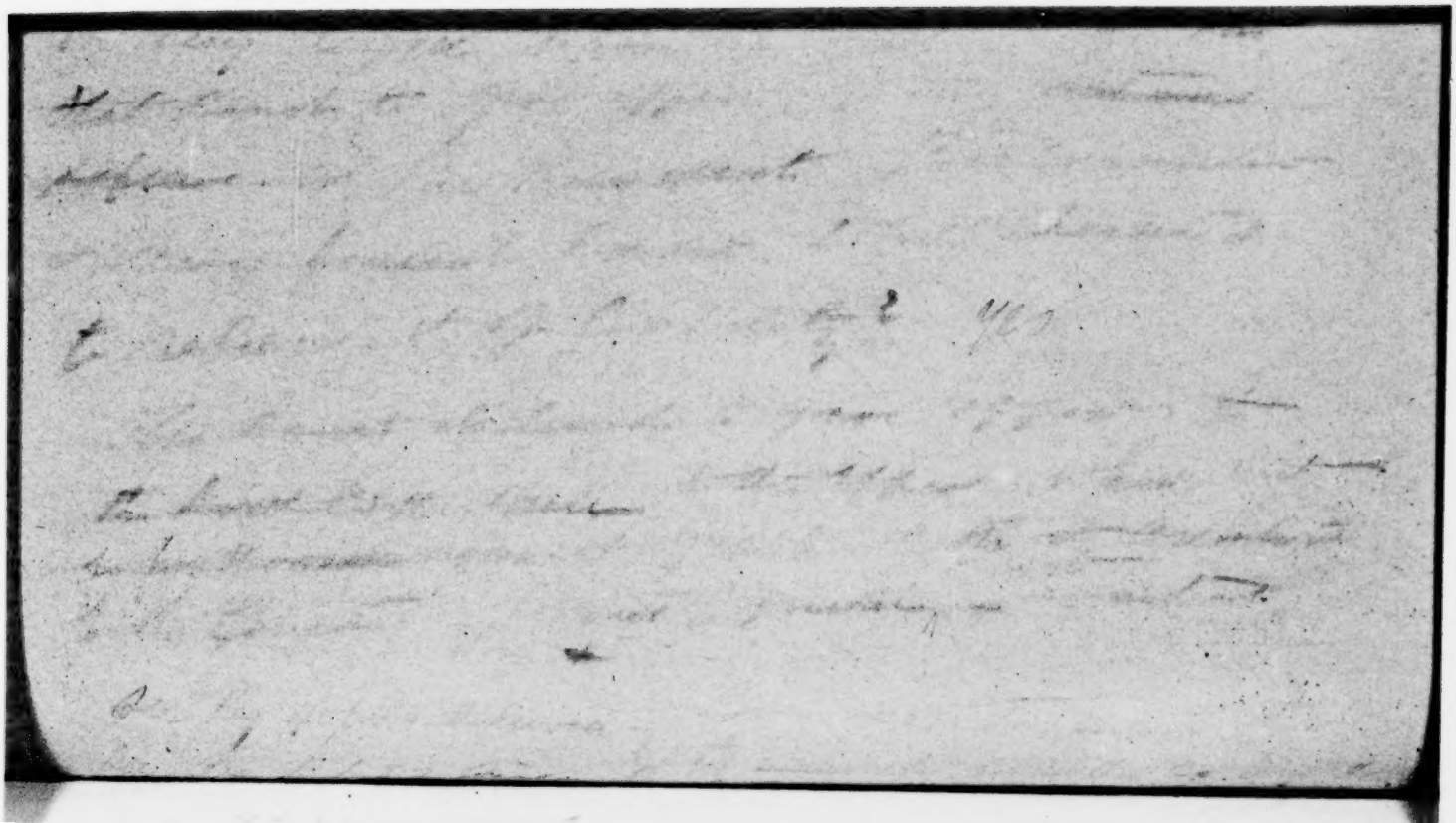
A. J. MULLENS.

ON A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF WYOMING COUNTY, STATE OF WEST VIRGINIA.

PETITION FOR CERTIORARI FILED AUGUST 27, 1924

CERTIORARI GRANTED DECEMBER 15, 1924

(30,584)



(30,584)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 619

THE VIRGINIAN RAILWAY COMPANY, PETITIONER,

vs.

A. J. MULLENS

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF WYOMING COUNTY

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[fol. a] **IN CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA**

[Title omitted]

STATE OF WEST VIRGINIA,
County of Wyoming, To-wit:

CLERK'S CERTIFICATE

I, Geo. M. Farley, Clerk of the Circuit Court of the County aforesaid, do hereby certify the following is a true copy of the original record in the above styled action, including all orders entered in same and as the same appears of record in my said office.

Given under my hand and the seal of the Court, this 28th day of July, 1924.

Geo. M. Farley, Clerk. (Seal.)

1

[fol. b] IN SUPREME COURT OF APPEALS OF WEST VIRGINIA

[Title omitted]

ORDERS OVERRULING PETITION FOR WRIT OF ERROR - March 31, 1924.

This day came the Virginian Railway Company, by Brown, Jackson & Knight, Williams, Loyall & Tunstall, M. P. Howard, H. S. Hall and Martin & Wingfield, its attorneys, and presented to the Court a petition praying for a writ of error and supersedeas to a judgment of the Circuit Court of Wyoming County, rendered on the 1st day of December, 1923, in a case in which A. J. Mullens was plaintiff and said petitioner was defendant, with a record of the judgment aforesaid accompanying the petition, which being seen and inspected by the Court, the writ of error and supersedeas prayed for is refused.

March 31, 1924 [Title omitted]

This day came Virginian Railway Company, by Brown, Jackson Knight, Williams, Loyall & Tunstall, M. P. Howard, H. S. Hall and Martin & Wingfield, its attorneys, and presented to the Court a petition praying for a writ of error and supersedeas to a judgment of the Circuit Court of Wyoming County, rendered on the 1st day of December, 1923, in a case in which A. J. Mullens was plaintiff and said petitioner was defendant, with a record of the judgment aforesaid accompanying the petition, which being seen and inspected by the Court, the writ of error and supersedeas prayed for is refused.

A true copy.
Attest:

Wm. B. Mathews, Clerk Supreme Court of Appeals.

2

[fol. 1] IN SUPREME COURT OF APPEALS OF WEST VIRGINIA

A. J. MULLINS, Plaintiff Below, Defendant in Error,

vs.

THE VIRGINIAN RAILWAY COMPANY, a Corporation, Defendant Below, Plaintiff in Error

PETITION FOR A WRIT OF ERROR

To the Honorables the Judges of the Supreme Court of West Virginia:

Your Petitioner, the Virginian Railway Company, respectfully represents it is aggrieved by a judgment rendered against it in favor of A. J. Mullens by the Circuit Court of Wyoming County in this State, on the 1st day of December, 1923, in the above entitled cause depending therein, for the sum of $8,000.00, with interest thereon from the 21st day of August, 1923.

Your Petitioner files herewith and makes a part of this petition the record in said action, and respectfully represents that the Court erred in overruling your petitioner's demurrer to the plaintiff's declaration and each count thereof in said action; in refusing to give to the jury Instruction "A," offered by your petitioner, directing a verdict for the Defendant in said cause, and in refusing to give [fol. 2] to the jury Defendant's Instructions Nos. 4 to 13, inclusive, and in giving to the jury over Defendant's objections Plaintiff's Instructions 1 to 7, inclusive; and in refusing to set aside the verdict of the jury as contrary to the law and the evidence; in refusing to grant the petitioner a new trial, and in overruling your Petitioner's objection to certain evidence offered by the plaintiff in said cause and fully set forth in said record, all of which objections and exceptions appear on the face of the record filed herewith. Also for other causes apparent upon the face of the record filed herewith.

Your petitioner, therefore, prays that a writ of error and supersedeas to said judgment may be granted, and that said judgment may be reviewed by this court; and as in duty bound, your petitioner will ever pray, etc.

The Virginian Railway Company, Brown, Jackson & Knight, Williams, Loyall & Tunstall, M. P. Howard, H. S. Hall, Martin & Wingfield, Attorneys.

Certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

3

STATE OF WEST VIRGINIA:

[fol. 3] IN CIRCUIT COURT OF WYOMING COUNTY

SUMMONS AND SHERIFF'S RETURN

To the Sheriff of Wyoming County, Greeting:

We command you, in the name of the State of West Virginia, to summon The Virginian Railway Company, a Corporation, if it be found within your bailiwick, to appear before the Judge of our Circuit Court for the County of Wyoming, at Rules to be held in the Office of the Clerk of said Court, on the First Monday in July, 1921, to answer A. J. Mullins of a plea of Trespass on the Case.

Damages, $25,000.00.

And have then there this writ.

Witness: Geo. M. Farley, Clerk of our said Court, at the Courthouse of said County, of the 14th day of June, 1921, and in the 58 year of the State.

Geo. M. Farley, Clerk, by C. V. Shannon, Deputy.

WYOMING CIRCUIT COURT, JULY RULES, 1921

[Title omitted]

Executed the within summons upon the within named The Virginian Railway Company, a corporation, on the 18th day of June, 1921, by delivering on that day a true copy thereof to S. H. Davis, a depot agent in the actual employment of said corporation, in the County of Wyoming and State of West Virginia, that being the County, and State wherein the said S. H. Davis, the depot agent in the actual employment of said corporation resides, the president or other chief officer of said corporation and the person appointed pursuant to law to accept service of process for it, and the secretary, cashier, treasurer of said corporation, and the members of the board of directors thereof, all being absent from my county, and there being no other person within the State than the said S. H. Davis, depot agent as aforesaid, upon whom service of said summons could be made.

Hiram Sizemore, Sheriff of Wyoming Co., W. Va., by A. B. Shannon, Deputy.

[fol. 4] 4

IN CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

A. J. MULLENS, Plaintiff,

vs.

VIRGINIAN RAILWAY COMPANY, a Corporation, Defendant

In Trespass on the Case

BILL OF COMPLAINT—Filed July 6, 1923

A. J. Mullens complains of the Virginian Railway Company, a corporation organized under and by virtue of the laws of the State of Virginia and authorized by the laws of the State of West Virginia to do business therein, of a plea of trespass on the case for this: That the plaintiff is now and for more than twenty-five years last past has been the owner, in fee, and seized and possessed of a certain tract or parcel of land, situated on Slab Fork of Guyandotte River, in Slab Fork District of said Wyoming County, West Virginia; that, until the committing of the grievances herein complained of, the said Slab Fork flowed over and across plaintiff's said tract of land in and through a natural and well defined channel, and, during all the time aforesaid, never did any damage or injury to said tract of land or to the banks on either side of said channel; that, except for the diversion thereof herein complained of, said stream would have continued and would now be flowing over and across said tract of land without doing such damage or injury as aforesaid.

Plaintiff further complains that, in or about the year 1904, the said defendant entered into and upon a tract of land adjoining plain-[fol. 5] tiff's said tract of land, which tract of land, so entered upon the said defendant had acquired for the purpose, and dug out, a-graded and constructed thereon its railroad track, upon which it has at all times since, has been, and is now maintaining and operating its railroad system; and that, in digging out, grading and constructing its said railroad track, the said defendant, well knowing the premises, but contriving and wrongfully intending to injure and aggrieve the plaintiff in the possession and enjoyment of his said tract of land and to enter a part thereof adjoining and near to the land of the defendant unfit for use or occupation for any purpose whatsoever, unlawfully cast into and filled up the channel of said stream with stone, dirt, timber and other debris, on the bank thereof opposite plaintiff's said land, and thereby diverted the water of said stream from its said natural channel and caused the same to flow over and upon plaintiff's said land, on numerous occasions from the date of said diversion to the time of the institution of this suit, and to wash away and destroy plaintiff's fencing, buildings and other improvements upon said land and the soil, fruit trees, grass, and other crops then growing thereon, and render a large portion of plaintiff's said land uncultivatible and unfit for use or occupation

for any purpose, and by reason thereof the plaintiff was compelled to and did pay out and expend from time to time large sums of money, to-wit, more than $1,000.00 on account of constructing walls and embankments to protect his said land and property against the encroachments of said stream.

[fol. 6] And, particularly, plaintiff complains that, on or about the 15th day of July, 1919, by reason of the wrongful filling up of the channel of said stream by the defendant as aforesaid, the waters of said stream were diverted from its said natural channel and thereby caused to flow upon and over a large portion of plaintiff's said tract of land, and to wash away and destroy all of plaintiff's fencing, buildings, soil, fruit trees, grass, and other improvements and crops then being and growing thereon, and thereby rendered a large portion of plaintiff's said land uncultivatible and unfit for use or occupation for any purpose whatsoever, whereby and by reason of the aforesaid wrongful and unlawful acts of the defendant, in filling up the channel of said stream and diverting the waters thereof as aforesaid, the plaintiff has been injured and damaged to the amount of $20,000.00.

Second Count

And also for this: That while the plaintiff was *sic* ed and possessed of his aforesaid tract of land, as in the first count hereof alleged, the said defendant, on the 17th day of July, 1919, well knowing the premises, but contriving and wrongfully intending to injure and aggrieve the plaintiff in the possession and enjoyment of his said land and to render a part thereof unfit for use or occupation for any purpose whatsoever, unlawfully entered into and upon plaintiff's said land and dug up and hauled away and converted to its own use a large and valuable quantity of the stone sand and soil of plain-
[fol. 7] tiff's said land, and thereby rendered a large and valuable portion of said land uncultivatible and unfit for use or occupation for any purpose whatsoever, whereby and by reason whereof the said plaintiff has been injured and damaged to the amount of $5,000.00.

And plaintiff further complains that, by reason of all the wrongful and unlawful acts of the defendant complained of in the two counts hereof, the plaintiff has been injured and damaged to the total amount of $25,000.00.

And therefore he sues.

J. Albert Toler, P. Q.

[File endorsement omitted.]

[fol. 8] 5

IN CIRCUIT COURT OF WYOMING COUNTY

[Title omitted]

PLAINTIFF'S BILL OF PARTICULARS—Filed Aug. 5, 1923

The following is a statement of the amount of damages which the plaintiff will expect to prove and recover in this action, and is filed pursuant to the request of counsel for the defendant.

Damages suffered by the plaintiff on account of land washed away by water	$15,000.00
Damages done by water overflowing land and injuring and destroying the soil, grass and other crops	2,000.00
Damages done by water overflowing land and washing away apple trees	1,000.00
Damages done by washing away fences	1,000.00
Damages done on account of money paid out and expended by plaintiff in efforts to protect his property by building walls	1,000.00
Total damages	$20,000.00

A. J. Mullens, Plaintiff, by J. Albert Toler, His Attorney.

[File endorsement omitted.]

[fol. 9] 6

IN CIRCUIT COURT OF WYOMING COUNTY

[Title omitted]

PLEA OF NOT GUILTY—Filed Nov. 9, 1922

The said defendant says that it is not guilty of the said several trespasses in manner and form as the plaintiff hath before thereof complained, and of this the said defendant puts itself upon the country.

M. P. Howard, Williams, Loyall & Tunstall, Walter C. Plunkett, Hall, Wingfield & Apperson, p. d.

[File endorsement omitted.]

In Circuit Court of Wyoming County

[Title omitted]

Answer—Filed Nov. 9, 1922

And the said defendant, for further plea in this behalf says that the said plaintiff ought not to have or maintain its aforesaid action thereof against it, because the said defendant says that the said several supposed causes of action in the said declaration mentioned, if any such there were or still are, did not, nor did any of either of them accrue to the said plaintiff at any time within five years next before the commencement of this action in manner and form as the said plaintiff hath before thereof complained against it, the said defendant, and this the said defendant is ready to verify.

[fol. 10] Wherefore the said defendant prays judgment if the said plaintiff ought to have or maintain his said action thereof against it.

M. P. Howard, Williams, Loyall & Tunstall, Walter C. Plunkett, Hall, Wingfield & Apperson, p. d.

7

In Circuit Court of Wyoming County

[Title omitted]

Demurrer—Filed Nov. 9, 1922

The said defendant demurs to the said declaration and each count thereof and says that the said declaration and each count thereof are not sufficient in law. And for grounds of demurrer the said defendant says:

(1) That the said declaration is so vague and indefinite in its allegations as to the time when the supposed cause of action arose as not to give the defendant the information necessary to enable it to prepare its defense.

(2) That the said declaration and each count thereof shows on its face that the said supposed cause of action arose on the 15th day of July, 1919, at which time the United States Government had taken possession of and was actually in possession of and operating said defendant's line of railroad and that there is no liability on the defendant by reason of the acts set forth in said declaration. The alleged liability is upon the United States Government and not upon [fol. 11] the defendant company.

M. P. Howard, Walter C. Plunkett, Williams, Loyall & Tunstall, Hall, Wingfield & Apperson, p. d.

[File endorsement omitted.]

IN CIRCUIT COURT OF WYOMING COUNTY

[Title omitted]

ORDERS CONTINUING CAUSE—Filed Nov. 18, 1921

This day came the parties by their respective attorneys, and by agreement, this action is continued until a Special Term of this Court, which will begin on the 4th Monday in February, 1922.

[File endorsement omitted.]

[fol. 12] 8

[Title omitted]

This day came the parties by their respective attorneys, and by agreement, this action is continued until the next term of this Court.

[File endorsement omitted.]

[Title omitted]

This day came the parties by their respective attorneys, and by agreement this case is continued until the regular November, 1922, term of this Court.

[File endorsement omitted.]

[fol. 13] [Title omitted]

This day came the parties by their respective attorneys, and on motion of the defendant leave is granted it to file its demurrer in writing and its two pleas marked "Plea —," "Plea No. 2," which demurrer and said two pleas are accordingly filed in open court, and the Clerk is directed to so endorse them.

And by agreement of the parties, on motion of the defendant this cause of action is continued until the next regular term of this Court.

[File endorsement omitted.]

[fol. 14] IN CIRCUIT COURT OF WYOMING COUNTY

[Title omitted]

ORDER TO TAKE TESTIMONY—Filed Aug. 15, 1923

By consent of the parties it is ordered that the defendant has leave to take the deposition of A. M. Traugott at the office of the Virginian Ry. Co. in the city of Norfolk, Va., on Aug. 18, 1923, at 10 o'clock A. M., and no other or further notice is required.

[File endorsement omitted.]

IN CIRCUIT COURT OF WYOMING COUNTY

[Title omitted]

VERDICT—Filed Aug. 22, 1923

This day came the parties by their attorneys, and the Court doth overrule the demurrer of the defendant heretofore filed, to which action the defendant excepted. Thereupon came a jury to-wit: T. W. Buchanan and eleven other good and lawful men who were duly empanelled, tried and sworn to well and truly try the issues joined between the plaintiff and defendant and a true verdict render accord-[fol. 15] ing to the law and evidence, and having heard all the evidence and the instructions of the Court and the arguments of counsel retired to their room to consider of their verdict, and sometime thereafter they returned into court with the following verdict, to-wit:

"We the Jury, upon the issues joined between the plaintiff and the defendant find for the plaintiff and assess his damages at the sum of $8,000.00.

T. W. Buchanan, Foreman."

And thereupon the defendant by counsel moved the court to set aside said verdict and grant it a new trial, which motion the court takes under advisement and this cause is continued.

[File endorsement omitted.]

[fol. 16] IN CIRCUIT COURT OF WYOMING COUNTY

[Title omitted]

JUDGMENT—Filed Dec. 1, 1923

This day came again the parties, by their attorneys, and the matters of law arising upon the defendant's motion to set aside the ver-

dict of the jury and grant it a new trial having been argued by counsel and maturely considered by the Court, the Court is of opinion to and doth overrule said motion, to which action and ruling of the Court in overruling its said motion and refusing to set aside said verdict and grant it a new trial, the defendant, by counsel, at the time excepted.

It is, therefore, considered by the Court and it is accordingly adjudged and ordered that the plaintiff, A. J. Mullens, do recover of and from the defendant, the Virginian Railway Company, a corporation, the said sum of Eight Thousand Dollars ($8,000.00) as found by said jury in their verdict as aforesaid, together with interest on said sum at the rate of six per cent per annum from the 21st day of August, 1923, that being the date of said verdict, until [fol. 17] paid, together with all its costs by him in and about the prosecution of this action on his behalf expended, including a statutory attorney's fee of Ten Dollars ($10.00), for all of which execution is directed to be issued at the proper time on the request of said plaintiff to which action of the court the defendant, by counsel excepted.

Thereupon, the defendant moved the Court for a stay of execution in this action for a period of Sixty (60) days from this date for the purpose of allowing defendant to apply to the Supreme Court of Appeals of this State for a writ of error and supersedeas, which motion the Court sustained, and, by agreement of counsel, the filing of a stay bond is waived.

[File endorsement omitted.]

[fol. 18] IN CIRCUIT COURT OF WYOMING COUNTY

[Title omitted]

ORDER SETTLING BILL OF EXCEPTIONS NO. 1—Filed Dec. 13, 1923

This day came the defendant by its attorney and presented to the Court its Bill of Exceptions, marked for identification "Bill of Exceptions No. 1," and prayed that the same might be signed, sealed and made a part of the record, which is accordingly done, this 13th day of December, 1923, and within thirty days after the date on which the judgment was entered.

R. D. Bailey, Judge.

[File endorsement omitted.]

[fol. 19] 9

IN CIRCUIT COURT OF WYOMING COUNTY

[Title omitted]

Bill of Exceptions No. 1.

Be it remembered that, upon the trial of this case before a jury, the plaintiff, to maintain the issue upon his part, introduced before the Court and jury the following evidence, to-wit:

A. J. MULLENS, the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Toler:

Q. State your name to the jury?
A. A. J. Mullens.
Q. Are you the plaintiff in this case?
A. Yes, sir.
Q. Where do you reside, Mr. Mullens?
A. At Mullens.
Q. Is that in this county?
A. Yes, sir.
Q. How long have you resided at that place?
A. You mean in the county or just the place I am now staying?
Q. In that vicinity?
A. Well, twenty-seven years in the corporation limits.
Q. Did you reside in the county before you moved to the place that is now called Mullens?
A. No, sir.
Q. How old are you, Mr. Mullens?
A. Sixty-six.
Q. It is alleged in the declaration in this case that you are the owner of a tract of land situate in the town of Mullens, on Slab Fork [fol. 20] Creek of Guyan River, in Slab Fork District. I will ask you if you are acquainted with the boundaries of this tract of land?
A. I am.
Q. How long have you owned it, Mr. Mullens?
A. About twenty-eight years, I guess; twenty-eight or twenty-nine, or somewhere along there.
Q. I will ask you to state whether or not you are acquainted with Slab Fork Creek?
A. Yes, sir.
Q. Which flows through and by that tract of land?
A. I am.
Q. Is that a well defined stream of water?
A. Well, it is not now.

Q. May be you don't understand my question. Has that stream of water been there ever since you have lived there?

A. Yes, sir.

Q. Does it have a regular and natural channel and bed and banks?

A. Yes, sir.

Q. Has there been any change in the channel of that stream where the same flows through and by your land since you became the owner of it?

A. There as been some change.

Q. Since when did that change occur?

A. I will say something like about 1904; somewhere along there. I haven't got the date.

Q. Are you acquainted with the location of the railroad now owned and operated by the Virginian Railway Company up and down Slab Fork Creek?

A. Yes, sir.

[fol. 21] Q. How long have you been acquainted with that railroad?

A. Well, I believe they built that railroad in about 1904, or along about that time.

Q. Have you been acquainted with it at all times since then?

A. Yes, sir.

Q. I will ask you to state how that railroad was located and built along Slab Fork Creek, on the opposite side of the creek from the tract of land owned by you, about which you have testified, with reference to the channel of Slab Fork Creek as it existed at the time and just before the railroad was constructed?

A. There is a portion of it right opposite where I am living now; that railroad was built in a portion of the channel out in the creek; built out in the channel of the creek.

Q. Are you acquainted with the block of lots known and designated on a map filed in the office of the Clerk of the County Court of this county as the A. J. Mullens Second Division to the Town of Mullens?

A. Yes sir.

Q. Are you acquainted with the block of lots immediately adjoining the said block of lots at the upper end of them known as the H. E. Lilly Addition?

A. Yes, sir, I am acquainted with that.

Q. I believe that the block of lots known as the A. J. Mullens Second Addition adjoins or extends nearly to the block of lots originally laid out and known as the Town of Mullens?

A. Yes, sir.

Q. Were those lots laid out?

A. They practically adjoin; there has been another addition put [fol. 22] in between that, but they practically adjoin.

Q. I will ask you if, at the time this railroad was constructed, you owned all the land from the mouth of Slab Fork along up Slab Fork to and including what is now known as the A. J. Mullens First Addition to the Town of Mullens?

A. Yes, sir, I owned that.

Q. Where is the tract of land now owned by you and which is referred to in the declaration in this case located with reference to the tract of land out of which the block of lots known as the A. J. Mullens First Addition to the block of lots known as the H. E Lilly Addition?

A. This land is between the H. E. Lilly Addition and the A. J. Mullens First Addition, adjoining both additions.

Q. Where do you live?

A. I live on this land, the acreage between the two additions, the A. J. Mullens Addition and the H. E. Lilly Addition.

Q. Are you acquainted with the location of two culverts or water drains under the Virginian Railway track just across Slab Fork Creek and opposite the land referred to in the declaration?

A. Yes, sir, I am acquainted with the two culverts.

Q. Were you living at what is now the Town of Mullens at the time this railroad was constructed?

A. Yes, sir.

Q. Were you there during the time that it was being constructed?

A. Yes, sir.

Q. I will ask you to state how long you have lived at the place where you now live?

A. Well, on that piece of land I am now living on, I have been there twenty-seven years past.

[fol. 23] Q. And how long have you lived in the house in which you now live?

A. Well, I will say about fifteen years; I haven't got a record of it.

Q. Did you move there before or after this railroad was constructed?

A. After.

Q. About how long?

A. Two or three years; I couldn't tell just how long. I have no record now. I live down at the river and had that house built up there and moved up there. I lived on the same piece of land.

Q. I believe you stated awhile ago that the railroad up and down Slab Fork, in the vicinity of the tract of land owned by you at this time was constructed partly in the original channel of Slab Fork Creek?

A. Yes, sir.

Q. Where was this with reference to the two culverts about which I asked you?

A. It was between the two culverts.

Q. I wish you would go ahead and describe to the jury just what was done in constructing this railroad with reference to constructing it in the channel of Slab Fork?

A. They dumped in dirt to make the fill above the culvert which he is now speaking about, the upper culvert, and down I will say may be two hundred feet, where the dirt was dumped in below, they shot a cliff off and filled the stream up and taken out a part of it and piled it against the bank opposite the railroad which made a very narrow channel in there, and they didn't take all the rock out. There is rock there yet that was shot off of the cliff.

[fol. 24] Q. Where is the edge of the fill as it was constructed and as it exists at this time with reference to the bank of the creek on the side on which your land is located?

A. The railroad fill you mean?

Q. Yes, sir?

Q. The railroad fill there where the cliff was shot off, I think, was right about in the bed of the creek; just about all the railroad was in the bed of the creek, as near as I can tell.

Q. Now, how far did that extend with reference to the two culverts, Mr. Mullens?

A. It extended plumb on, but not so bad where we are talking about the cliffs, but it extended plumb on below the other culvert, the fill, partly in the creek.

Q. How much of that fill would you say was located in the channel of the stream?

A. Well, I would say two-thirds of the fill was located in the channel of the stream, as near as I can tell, where the cliff is, and about one-third on below and also above about one-third, as near as I can tell now—no, about two-thirds above, up to as far as the line, and that is as far as this declaration is.

Q. As far as your land extends?

A. Yes, sir, and below where the cliff is shot off plumb down below the other culvert there was, I think, or to the other culvert there, about one-third of the railroad is off in the creek, as near as I can tell. Now, along where this cliff is it may have been one hundred feet there where I say the two-thirds was in the water, about as near as I can tell of the length of it.

Q. Was that below the upper culvert?

A. Yes, sir.

Q. I will ask you if you ever had a survey of the conditions as [fol. 25] they exist there at this time made?

A. Yes, sir.

Q. Who did you have to do that?

A. Mr. Collier, the civil engineer.

Q. You have him summoned here as a witness?

A. Yes, sir.

Q. Is it your understanding he will be here?

A. It is my understanding he will be here.

Q. Did you point out to Mr. Collier, for the purpose of enabling him to make this survey, the location of the original channel of Slab Fork as it existed before this railroad was constructed?

A. Yes, sir.

Q. Did you correctly point out that location to him?

A. As near as I could.

Q. He has made a map, Mr. Mullens, of the conditions there at this time showing the location of the old channel of the stream and the present channel. I will ask you to state whether or not you can see well enough to testify with reference to that map?

A. These large lines I can point them out.

Q. Can you read the lettering on the map?

A. Some I can and some I can't.

Q. Mr. Mullens, I will ask you to state whether the obstruction of this stream, as you have testified to by filling up, in the construction of this railroad, changed the channel of the stream?

A. It has.

Q. I will ask you if that change has affected your land in any way on the banks opposite where this fill was made?

[fol. 26] A. Yes, sir.

Q. In what way has it affected it?

A. It has washed off a great deal of the land and fruit trees. It taken off twenty-two fruit trees—apple trees.

Q. Now, has it injured your land in any otheer way. I mean done you any damage in any other way?

A. Yes, by washing the land off and washing out; I had that in grass and it washed that out, and also above there it washed my corn down and damaged that a great deal.

Q. I will ask you to state whether it washed away any fence or not?

A. It washed away a great deal of fence, a string around there—I don't know how long it was—a plank fence and posts.

Q. What effect did the filling up of this channel, as you have testified to, have on the water—the current of the water?

A. It would throw the current out over the bottom when there would come a big raise and there wasn't room enough to hold the water in the channel, and it washed my fence down.

Q. What effect did the throwing out of this water over the bottom have on your land?

A. Well, it would wash my fence down and wash my corn down, and that in the July raise washed a great deal of grass down that I didn't get.

Mr. Wingfield: July of what year?

A. 1919.

Q. When did the water begin to wash away your banks and lands and fencing and so forth, Mr. Mullens?

A. Well, it commenced cutting on the banks a little pretty soon after the construction, a little but not very much. The bushes and trees held it, I reckon, from cutting; it would run over the top of the bottom.

[fol. 27] Q. When was the first appreciable damage done to your land?

A. In 1917.

Q. Do you remember what month it was in?

A. In February, I think.

Q. Was there a large freshet in the stream at that time?

A. Yes, sir.

Q. Was it larger than usual?

A. Well, a little bit; it was a little over size; it was called the ice freshet.

Q. It is referred to as an ice freshet?

A. Yes, sir, the breaking up of ice.

Q. Do you know, Mr. Mullens, whether that freshet you refer to as the ice freshet was in February, 1917 or 1918?

A. I couldn't say which it was. I thought it was 1917, but I have no record of it.

Q. Had there been any noticeable amount of any serious injury done to your land prior to that by reason of the washing by this water?

A. Yes, there had been some cutting in the bank before that.

Q. How much?

A. Well, not very much, but there had been some cutting.

Q. Now, go ahead and tell what effect that freshet had on your land?

A. Well, I could show or point out on the map; I could tell the jury, I believe.

Q. Go ahead and point out on the map.

Mr. Wingfield: We object to the use of the map until it is identi-[fol. 28] fied.

Mr. Toler: I can't identify it until Mr. Collier comes.

Q. I will ask you to state, Mr. Mullens, whether you can distinguish the different colors of the lines on this map?

A. Yes, sir, I can.

Q. Do you know what the light yellow color represents?

A. I could by getting up there and looking.

Q. Go ahead and see if you can.

A. This represents the land that was washed off, I think.

Q. Can you see the green line there?

A. Yes, sir.

Q. Do you know what that represents on the map?

A. I think that is the channel of the Slab Fork now, as it is now.

Q. As it exists at this time?

A. As it exists at this time.

Q. Now, will you go ahead and point out to the jury what washing was done on your land by what you refer to as the ice freshet?

A. Now then, here you see there is a dot right here; that was big rock thrown out of the cliff; this big rock was thrown out into the creek and they piled this stone out of the creek, a portion of it, here against the bank, against that bank. I don't know, but I expect it is fifty feet long, right along this bank here, a great lot of stone piled up, which made this channel very narrow, and a big freshet began cutting some down here, it cut around here and run around that and come back into the channel down about here, I guess, and it come back into the main channel of the creek, and then I hired [fol. 29] a man to put a wall, a stone wall, what I call a rick rack wall, one hundred and twenty feet, which extended down near the lower end of that where it turned back into the creek.

Q. Why did you put that wall in there, Mr. Mullens?

A. To keep it from going down through there and cutting and destroying my land, and it did stop it along there.

Q. Now, in that freshet did the water spread out over any other part of your land?

A. Yes, it run out over the bottom towards my house.

Q. Since this obstruction in the river and prior to this ice freshet, to which you refer, had there been any freshets in which the water had run over any part of your land down there?

A. Not there.

Q. I mean any part of it along there?

A. Well, down below here, way down below here there was a place—I don't know how far that is down, but somewhere along down here, three or four hundred feet, there was an arm run around here that the water would run over, it would run around there.

Q. Was that during ordinary raises?

A. An ordinary raise would go around there.

Q. Would you regard this freshet that you refer to as the ice freshet as an extraordinary high freshet?

(Objected to by counsel for the defendant; which objection the Court sustained; to which ruling of the Court the plaintiff by his counsel, at the time excepted.)

Q. I will ask you to state whether or not it was an extraordinary high freshet?

(Objected to by counsel for the defendant; which objection the Court overruled; to which ruling of the Court the defendant by counsel, at the time excepted.)

A. Yes.

[fol. 30] Q. I believe you say that up in the vicinity where it washed your land that it spread out over your bottom there?

A. Yes.

Q. And that that had not occurred prior to that time?

A. It never had occurred until that fill was made that I ever knowed of.

Q. During the time you have lived there you have had occasion to observe the freshets all along as they came in Slab Fork, did you not?

A. Yes, sir.

Q. You have lived, all the time you have lived there, in a short distance of Slab Fork Creek?

A. Lived right there inside of the corporation.

Q. Now, speaking from your experience and knowledge and observation of the stream, state whether or not in your opinion this freshet would have washed away any part of your land or spread out over it in such a way as to injure it if this obstruction had not been placed in the stream by the railroad company, as you have testified?

(Objected to by counsel for defendant; which objection the Court overruled; to which ruling of the Court the defendant, by counsel, at the time excepted.)

A. I don't think it would.

Q. I believe you say that there had been some washing away of the banks prior to this ice freshet?

A. A little bit.

Q. Now, did that occur in ordinary and usual freshets?

A. Well, what we would call a winter freshet, a pretty good sized freshet I would say.

Q. After this ice freshet, I will ask you if the land washed any during usual and ordinary high rises in the stream?

[fol. 31] A. Yes.

Q. How often?

A. Every time there would come just an ordinary raise now it would run against the bank and cut out, and I throwed in some rocks, or had rocks hauled, even after I got the wall put up, and throwed in loose rock at another place against the bank and stopped it.

Q. Is there any other particular freshet or flood which you can describe that has occurred since the ice freshet that did injury to your land?

A. Well, the freshet, I think, was in 1919. I have no record now and this may not be correct, but I think it was in 1919, there come a big freshet and done a great deal of damage.

Q. Was that an extraordinary high freshet?

A. Yes, sir.

Q. How did it compare to the ice freshet to which you have referred?

A. I think about the same; not but a little difference, I don't think.

Q. What effect did that have on your land?

A. Well, that had a big effect; it washed off a sight of land and my fence.

Q. Did it spread out over your grass and crops?

A. Yes, sir, it spread out over my grass and washed down my corn; I didn't get over half of the grass, and it washed up several apple trees—twenty-two, I think.

Q. Twenty-two?

A. Yes, sir.

Q. I will ask you to state whether it cut a new channel through your land?

A. It cut a new channel. And the ice freshet washed up five or *[fol. 32]* six apple trees—I don't know how many it washed up, but it washed up some. Twenty-two was all I lost in all. I would say about fifteen apple trees, at a guess, that the freshet in 1919 washed up, and it washed over my corn and washed off my fence all around the creek bank for, I expect, nearly two thousand feet, plumb down to the Lilly Addition.

Q. Can you point out on the map, Mr. Mullens, the channel that was cut through your land by this 1919 freshet?

A. Yes.

Q. Will you do that?

A. Now, right here is the channel that was cut through and right on down through, leaving a little land there next to the creek and railroad, that was where the old channel run, leaving a strip of land in there and down through here.

Q. Was that channel cut through there for the entire width, as it appears on the map, at that time?

A. Yes, sir. Well, there had been a little washing with the ice freshet; it washed out a little, but it seemed to cut down two hundred feet down in that bottom. The ice freshet cut out some, but it never cut up to this where I had it stopped off, the ice freshet. I had a dam built there, what I call a riff-raff dam, with stone against the bank. That stopped it until it got down to here somewhere, and that turned it straight back into the channel. Now that ice freshet cut out in this bottom up to pretty close about, I guess, one hundred feet of this soil up here, the bank.

Q. You mean the ice freshet or the 1919 freshet?

A. The ice freshet left a strip in there and the 1919 freshet cleaned it up, cut it plumb through.

Q. Now, the 1919 freshet cut the entire width of the channel as it appears on the map there, and has there been any washing since that [fol. 33] time?

A. Well, there has been some washing since; it didn't cut it all. Every ordinary raise I will say would cut against the bank and would cut that channel and cut in against my orchard and cut against the bank and cut off the bank.

Q. Mr. Mullens, again speaking from your knowledge and observation of this stream and the rises in it, you may state whether or not in your opinion the water in that rise of 1919 would have cut the channel there through your land and washed it away as it did had it not been for the obstruction placed in the stream by the defendant?

A. I don't think it would.

Q. Go ahead and explain to the jury why you think it would not?

A. I think in the year 1901, or about the year 1901, we had as much water in Slab Fork as we did in 1919 and it didn't get to the top of the bank up there.

Q. Was that before the obstruction was placed in the channel by the defendant, the railroad company?

A. Yes, sir.

Q. Did it wash away any of your land?

A. Well, not up there. It run over the land down next to the river. I think we had as much water at that raise as we did in 1919 and it didn't come to the top of the banks up there; the banks was pretty high up there.

Q. Mr. Mullens, how much damage has been done to your land and property by reason of this washing from June 14, 1916, up to the date of the institution of this suit?

(Objected to by counsel for defendant; which objection the Court sustained; to which ruling of the Court the plaintiff, by counsel, at [fol. 34] the time excepted.)

Q. Mr. Mullens, you have testified that certain of your land has been washed away; do you know whether or not Mr. Collier has determined the amount of land that has been washed away?

A. He told me yesterday that he had, except a little on the lower end.

Q. I will ask you to what extent this land has been washed away?

A. Well, there is over two acres, from what Mr. Collier told me, that has been washed away.

Q. I mean by the extent, to what depth has the soil and sub-soil been washed away?

A. I will say five feet. The wall that I put up there was five feet high, to the top of the bank.

Q. For what is this land valuable, Mr. Mullens?

A. Well, I value it at about $7,000.00 an acre.

Q. By the question I mean for what is it valuable?

A. For town lots.

Q. Now, what effect does this washing away of the soil, as you have described, have on the value of the lots, if any?

A. I think it would be fifty per cent.

Q. Did you have Mr. Collier to estimate the number of lots that was washed away?

A. I made a mistake—it was about, yes, he estimated it to be about fifteen lots and I estimated the lots at about $1,500.00 a lot.

Q. As the value of them?

A. As the value.

Q. You mean under the conditions that they now exist, that the washing done or after the washing?

[fol. 35] A. Before the washing.

Q. Are you acquainted with the values of land and lots in the town of Mullens?

A. Yes, sir.

Q. How long have you been acquainted with them?

A. I have been acquainted ever since the town was laid off.

Q. I believe you were the original owner of all the lots laid off in the town above Slab Fork Creek?

A. Yes, sir.

Q. And you had occasion during all the time that the lots have been on the market for sale there to observe and notice the selling prices?

A. Yes, sir.

Q. Now, I will ask you to state the amount of damages done to your land by reason of the soil and sub-soil being washed away, as you have testified?

(Objected to by counsel for defendant; which objection the Court overruled; to which ruling of the Court the defendant, by its counsel, at the time excepted.)

A. Now, this is what I am on is that two acres, practically two acres, what the damage would be. I consider $12,000.00 damage to the land at least.

The Court: Now, you are talking about the two acres; is that referred to also as the fifteen lots?

A. It is the same.

Q. Did you own what is now the H. E. Lilly Addition at the time the 1919 freshet occurred?

A. Yes, sir.

Q. When did you sell it with reference to that freshet?

[fol. 36] A. I sold it, I expect, in August, right soon after the freshet; I think that was in July.

Q. Had the channel that you testified to been cut through it and the washing been done at that time?

A. Yes, sir.

Q. For what did you sell that addition?

A. I sold that for $7,000.00.

Q. Did you deduct from the price of it anything on account of this washing?

A. I deducted $3,000.00 that I sold for less than I would have sold it.

Q. In your opinion was it damaged to that extent?

A. I thought it was more than that; that is what I deducted.

(Counsel for the defendant now moves to strike any evidence as to the H. E. Lilly land; which motion the Court overruled for the time being; to which ruling of the Court the defendant, by counsel, at the time excepted.)

Q. Mr. Mullens, you have testified that you had certain grass and other crops that were destroyed and washed away. I will ask you to state the amount of damages that you suffered on that account between the 14th day of June, 1916, and the date of the institution of this suit, on the 14th day of June, 1921?

(Objected to by counsel for defendant; which objection the Court overruled; to which ruling of the Court the defendant, by counsel, at the time excepted.)

A. I think I suffered $200.00 in my grass and corn is the way I have got it figured out.

Q. Would you say that you have suffered that amount of damages in the least?

[fol. 37] A. In the least; yes, sir. That is the way I figured it.

Q. You testified that there were fifteen apple trees washed away in the 1919 flood and about seven in the ice flood. I will ask you to state the amount of damages that you sustained on account of the loss of those apple trees?

A. I figured that at the least $100.00 damages.

Q. What kind of apple trees were those?

A. They were principally the northern fruit; I couldn't tell the name. Some were the Yellow Transparent.

Q. What you mean by northern is that you bought them from a standard nursery?

A. Yes, sir, I bought them from a standard nursery company; that is what I mean by northern.

Q. How old were they, Mr. Mullens?

A. Well, they was put out right soon after I got there; I would say they was about five years old, and some was older than that.

Q. Were they bearing, or any of them?

A. About four of them was bearing. I think there was more, but I put it at four at the least.

Q. What do you figure the four bearing trees were worth?

A. I figured the bearing trees worth $200.00, that is $50.00 a tree, is the way I have got it figured.

Q. And you figured the other eighteen worth the other $200.00?

A. Yes.

Q. Now, what amount of damages, Mr. Mullens, have you suffered by reason of your fencing being washed away?

A. I put that at, I think, in the least, $100.00.

[fol. 38] Q. Have you paid out or expended any money in an effort to protect your land from this washing?

A. I have.

Q. What did that amount to?

A. That amounted to $382.68.

Q. Was that necessary in order to protect your land from this stream?

A. Yes, sir.

Q. When was that money paid out, Mr. Mullens?

A. There was a portion of it paid out in the year 1917, $120.00, and the remainder was paid out last spring, along about April, I think it was.

Q. Now, I will ask you to state to the jury whether you have figured up the total amount of damages that you have suffered on account of the washing away of your land and the grass and crops and fruit trees and fences and what you have expended in an effort to protect your land?

A. I have.

Q. Will you state that amount to the jury?

(Objected to by counsel for defendant; which objection the Court overruled; to which ruling of the Court the defendant, by counsel, at the time excepted.)

A. $16,292.68 is what I figured it at the least.

Q. Mr. Mullens, you may state whether in your opinion, under the conditions as they now exist there, whether the water will continue to wash away your land?

(Objected to by counsel for defendant; which objection the Court sustained; to which ruling of the Court the plaintiff, by his counsel, at the time excepted.)

(Counsel for the plaintiff vouches that if the witness were per-[fol. 39] mitted to answer this question that he would say that under the conditions existing that the water will continue to wash away and destroy the plaintiff's land unless a wall is constructed for the protection of the land.)

Q. I will ask you to state, Mr. Mullens, whether there is any way that the encroachments of this water upon your land and the washing away of it could be stopped and prevented?

A. There is.

Q. How could that be done?

(Objected to by counsel for defendant; which objection the Court overruled; to which ruling of the Court the defendant, by counsel, at the time excepted.)

A. By building a retaining wall.

Q. I will ask you to state whether you have had any mason, or person acquainted with such work as would be necessary to construct this wall, to investigate the matter for the purpose of determining what the wall would cost?

A. I have.

Q. What did he advise you with reference to the cost of this wall?

(Objected to by counsel for defendant; which objection the Court sustained; to which ruling of the Court the plaintiff, by his counsel, at the time excepted.)

Q. Is that witness here?

A. Yes, sir.

Q. I wll ask you to state, Mr. Mullens, whether a wall could have been built heretofore to have protected your land, or if any other action could have been taken to prevent the washing away of your land and the destruction of your property, as you have testified to here?

A. There could have been a retaining wall built and also I think [fol. 40] there could have been some dirt removed to widen the channel and that would have protected me above where this wash out is and along down where I stated the rock was pushed over and piled against the bank. There could not have been any wall built there.

Q. What place do you refer to that a wall could not have been made?

A. Before the washout there couldn't have been any wall made below the culvert; the channel had to bewidened there; it could have been widened and then a wall built and it could have been saved.

Q. If the channel had been properly widened and a wall constructed, in your opinion would that have prevented the channel that has been cutting through your property?

A. Yes, sir, that would have prevented it, if the channel of the creek had been widened and then a wall built on the side after the railroad was built, I don't think there would have been any cutting or washing away of the land.

(Counsel for defendant moved to strike the foregoing answer; which motion the Court overruled; to which ruling of the Court the defendant, by counsel, at the time excepted.)

Q. Why did you not take that action and widen the channel and build this wall, Mr. Mullens?

A. Well, I had correspondence with Mr. Taylor and he promised that he would build it, and then another thing it took a whole lot of money and I didn't have the money to build it.

(Counsel for defendant moved to strike out the foregoing answer; which motion the Court sustained; to which ruling of the Court the plaintiff, by his counsel, at the time excepted.)

Q. Who was this Mr. Taylor that you refer to?

A. I understood that Mr. Taylor was the superintendent of the [fol. 41] railroad company and has been the manager of that section, I don't know how long—president, I believe, they call him.

Q. That is Mr. R. L. Taylor?

A. Yes, sir.

Q. I believe you say you had discussed with him the matter of building a wall and widening the channel?

A. Yes, sir, I had correspondence and also discussed it. He come over and we went and looked at it and discussed the matter.

Q. When was that, Mr. Mullens?

A. I don't know what year, but I think it was about 1920 maybe, or somewhere along there.

Q. Was it before the suit was instituted?

A. Yes, sir, before a suit was instituted some time.

Q. What did he say to you with reference to constructing this wall?

(Objected to by counsel for the defendant; which objection the Court overruled; to which ruling of the Court the defendant, by counsel, at the time excepted.)

A. I did have a conversation with L. R. Taylor, then superintendent of the New River Division of the Virginian Railway, with reference to taking some action to widen the channel of the stream and construct a wall for the protection of my land against the encroachments of the water, and that Mr. Taylor at that time stated to me that while he had no authority from the railroad company to take any action towards the construction of a wall or widening the channel, but that he would take it up with the company and felt sure that the company would take some action to widen the channel and construct a wall to protect my land, and that I, by reason of the assurance given me by Mr. Taylor, relied on and expected that the railroad company would take some such action.

[fol. 42] Q. Mr. Mullens, you testified this morning with reference to a conversation that you had with Mr. L. R. Taylor, along about 1920, with reference to the construction of a wall or widening the channel of the stream there at that place so as to protect your land. I will ask you to state where you were when you had that conversation with Mr. Taylor?

A. We were on the railroad, right over across from the washout, where the land had washed off.

Q. Were you and Mr. Taylor up there for the purpose of looking over this situation?

A. Yes, sir.

Q. I will ask you to state whether you made any proposal to Mr. Taylor with reference to widening the channel of the stream and the

construction of a wall along there for the protection of your property?

A. I did.

Q. Will you state what proposition you made him?

(Objected to by counsel for defendant; which objection the Court sustained; to which ruling of the Court the plaintiff, by his counsel, at the time excepted.)

(Counsel for the plaintiff vouches that if the witness were permitted to answer that he would say that he at that time proposed to Mr. Taylor that if the railroad company would bear the expenses of the construction of a wall the plaintiff would donate sufficient land upon which to construct the wall and widen the channel of the stream sufficient to protect the land and permit the water to flow in the natural and usual way.)

Q. I will ask you to state whether Mr. Taylor accepted or agreed to accept the proposition or offer that you made him on this occasion?

(Objected to by counsel for defendant; which objection the Court [fol. 43] sustained; to which ruling of the Court the plaintiff, by his counsel, at the time excepted.)

Q. I will ask you to state what he said, if anything, in reply to the proposal or offer that you made to him?

(Objected to by counsel for defendant; which objection the Court sustained; to which ruling of the Court the plaintiff by his counsel, at the time excepted.)

(Counsel for the plaintiff vouches that if the witness were permitted to answer he would say that Mr. Taylor did not reject the proposition or accept it, but stated to the plaintiff that he would take the matter up with the railroad company and felt sure that the railroad company would agree to the proposition and would construct the wall.)

Q. I will ask you to state whether the defendant ever at any time made any effort or done anything towards building a wall or widening the channel of that stream for the purpose of protecting your land and property?

A. He did not.

Cross-examination.

By Mr. Wingfield:

Q. Mr. Mullins, I believe you stated that you have lived twenty-seven years in the present corporate limits of the town of Mullens; where did you live before that time?

A. In McDowell County.

Q. So Mullens was the first place you lived when you came to Wyoming County?

A. Yes, sir.

Q. At that time there was no town of Mullens, was there?
[fol. 44] A. Sir?
Q. There was no town at Mullens when you came there to live?
A. No, there was no town.
Q. There was no railroad through there either, was there?
A. No, sir.
Q. How much land did you buy at that time where the town of Mullens now is?
A. Well, there is a portion of a 69-acre tract and we supposed I got 60 acres.
Q. Is that all the land you owned at Mullens?
A. Yes, sir.
Q. Didn't you buy other lands afterwards?
A. No, sir.
Q. So your entire holdings there were about 60 acres?
A. Yes, sir.
Q. That was farming land entirely, wasn't it?
A. Yes, sir.
Q. It was situated at the junction of Guyandotte River and Slab Fork Creek, wasn't it?
A. Yes, sir.
Q. And extended up Slab Fork?
A. Up Slab Fork.
Q. There were no coal mines in this country then, was there?
A. There was none running; there was some opened up but only for temporary use.
Q. Mullens was then how far from the nearest railroad?
A. Well, at Keystone was the nearest railroad.
[fol. 45] How far was it over to Keystone?
A. I guess it was about twenty miles, to go the near way, but you couldn't take a wagon through that way.
Q. How far was it by the nearest road?
A. The wagon road, I expect it was up in near twenty-five miles or thirty miles.
Q. What was the nearest town of any size?
A. The nearest town of any size, I guess, was Keystone or Pineville, but there wasn't but a few houses at Pineville; the county seat was at Oceana.
Q. How far was it to the county seat, at Oceana?
A. Abour thirty miles.
Q. And what was the nearest town of any considerable imporaance?
A. I would say Keystone was the nearest.
Q. Was there where you got your supplies?
A. Yes, sir.
Q. And you hauled them across the country twenty-five miles or more?
A. Yes, sir.
Q. Do you remember what you paid for this 60 acres?

(Objected to by counsel for plaintiff; which objection the Court overruled; to which ruling of the Court the plaintiff, by his counsel, at the time excepted.)

A. Yes, sir; I paid one thousand dollars for the 60 acres.

Q. You were about the only man living in this immediate section then, weren't you?

A. Oh, no.

Q. Who was your nearest neighbor?

A. William H. Lambert.

[fol. 46] Q. How far did he live away?

A. About a quarter of a mile, I reckon.

Q. And the place continued in that state until the building of this railroad, about 1904, did it not?

A. It continued in what state?

Q. As a farm?

A. Yes, sir, as a farm.

Q. This farm was located in rather a narrow valley, isn't it?

A. Yes, sir.

Q. Form- by Slab Fork watershed or valley, I suppose you would call it?

A. Yes, sir.

Q. Did you convey a part of this right-of-way for this railroad to the Deepwater Railway Company?

A. Yes, sir.

Q. I will show you a deed, dated October 10, 1902, from A. J. Mullens and Harriett Mullens, his wife, to the Deepwater Railway Company, which is signed by A. J. Mullens and Harriett Mullens, and I will ask you if that is your signature?

A. Yes, sir, I think it is.

(The deed above mentioned was here offered in evidence by the defendant and read to the jury; which deed is in the words and figures following, to-wit: Here insert deed.)

Q. Now, I will show you another deed, dated July 20, 1904, from A. J. Mullens and Harriett Mullens, his wife, to the Deepwater Railway Company, and will ask you if that is not your signature?

A. Yes, sir, I think it is.

The deed last above mentioned was here offered in evidence and [fol. 47] read to the jury; which deed is in the words and figures following, to-wit: (Here insert deed).

Q. Now, Mr. Mullens, it appears from those deeds that you first conveyed to the Deepwater Railway Company two strips of land, and the Deepwater Railway Company afterwards shifted its line somewhat and conveyed a portion of the land back to you and you conveyed them some additional land; is that correct?

A. Yes, sir, that is correct.

Q. Now, at that time the country was still a farm country at Mullens?

A. Yes, sir.

Q. And hadn't increased in value very much at that time?

A. No, sir, I don't think it had increased much at that time.

Q. And the Deepwater Railway Company built its road bed on this land you conveyed to them?

A. Yes, sir, on this land, but the washout is not on that.
Q. A portion of it is not on that?
A. No, sir.
Q. Did the Deepwater Railway Company build its depot on this land?
A. Yes, sir.
Q. And after that time coal mines were opened up there, were they not?
A. Yes, sir.
Q. They constucted a branch line leading down to Mullens and into these lands, didn't they, from the Winding Gulf?
A. Yes, sir, leading up the Winding Gulf, leading out from Mul-
[fol. 48] lens.
Q. And as a result of the building of this railroad and of the depot the town of Mullens sprung up, didn't it?
A. Yes, sir.
Q. And values there have gradually increased ever since then?
A. Yes, sir.
Q. And the town of Mullens is built principally on this 66 acres you have spoken of?
A. Yes, sir.
Q. And you have sold off practically all of it except the part involved in this suit from time to time?
A. Near about 12 acres is not sold off.
Q. That you still own?
A. Yes, sir.
Q. That has likewise increased in value?
A. Yes, sir, it has increased.
Q. Now, Mr. Mullens, you have spoken of the values of your land as of the present, as I understood it, these fifteen lots?
A. Yes, sir.
Q. The values you put on it as of June, 1923. Now, isn't it a fact that values of land down there have increased considerably since June, 1921, when this suit was brought?
A. Well, it is advancing every day, I guess.
Q. So land there today is worth more than it was in June, 1921?
A. Oh, yes, it is worth more.
Q. You continued to live on this 60 acre tract during the construction of this railroad, did you not?
A. Yes, sir.
Q. And you knew in a general way where the railroad was being
[fol. 49] constructed?
A. Yes, sir.
Q. They built it past your house, did they not?
A. Yes, sir.
Q. You were not particularly interested, I suppose, at that time in the exact location of the fills and other structures?
A. I saw them all.
Q. You saw them all?
A. I saw them all going in. I was right along there while they

was building the railroad and I guess there was never a day but what I saw them working there.

Q. You lived about the junction of the Guyandotte River?

A. I did, and while living there I had men sawing lumber for me up in the bottom near where that wash is.

Q. And you were there occasionally?

A. I was there about every day.

Q. How long were they building this piece of railroad up there?

A. Well, I couldn't tell just how long, but I guess six months, just to guess at it.

Q. Did you make any measurements at that time to determine how the embankment was located with reference to the creek?

A. No, sir, I didn't make any measurements.

Q. When you went up to where your saw-mill was located would you go along the road?

A. Yes, I would go the county road part of the way and go out through the bottom to the saw-mill.

Q. Where was the saw-mill located?

A. Located below the second culvert we are talking about on that map.

[fol. 50] Q. The county road was how far from the creek?

A. I expect three hundred feet from the creek.

Q. And where would you turn off from the county road to the saw-mill?

A. O, I would go up, I guess, in about one hundred yards of the saw-mill and go through the bottom out to the saw-mill sometimes and sometimes I would go up opposite the saw-mill and turn out through the bottom.

Q. In your testimony you spoke of the floods washing your fences?

A. Yes, sir.

Q. When was that fence washed away?

A. My fencing was washed down every time there come a big raise after the railroad was built through there, the water would run out through the bottom and wash the fence out. It was in the big flood of July, 1919, that washed it off further around the bank.

Q. That is what you are claiming the $100.00 for, that fencing that was washed away in July, 1919?

A. Yes, sir.

Q. I believe you also said at the time the corn and grass was washed away was in July, 1919?

A. Yes, sir, it was.

Q. I understood you to say that the first appreciable damage that was done to the land was done in this big ice freshet as you call it?

A. Yes, sir.

Q. Now, was that the winter that was so very cold in this country?

A. Oh, yes.

Q. That was the very cold winter we had?

[fol. 51] A. Yes, sir.

Q. Everybody remembers that was the coldest winter we had for years?

A. Yes, sir, the coldest weather we had for several years.

Q. That was during the war, wasn't it?

A. Well, I guess it was.

Q. Now, wasn't that very cold winter, when this ice formed in the river and caused that big freshet, in February, 1918, or in February, 1917?

A. I say 1917 or 1918, I don't know which it was.

Q. You don't remember which?

A. No, sir.

Q. I understood you to say that both the ice freshet and the freshet of July, 1919, were extraordinary freshets?

A. Yes, sir.

Q. If 1918 was the extremely cold winter we had, that was the year in which this ice freshet was that did this washing?

A. Yes, sir, that was the cold winter; that was the time, whether it was 1917 or 1918.

Q. As I understand it, most of this washing has been done in 1917 was in these two freshets, one in July, 1919, and the other in the cold winter?

A. Yes, sir.

Q. And there has been apparently no washing done since the flood of 1919?

A. Yes, sir, there has been a little washing along through there every ordinary raise.

Q. But it has been comparatively little as compared to what was done at these other two freshets?

A. Yes, sir.

[fol. 52] Q. I believe you said at places this land was washed as much as five feet deep?

A. I had a wall built last spring five feet high, to the top of the bank, hired a man to put in a retaining wall out of wood, and it was five feet high and was filled in with rock; that was the top of the bank.

Q. But the land itself is still there?

A. That was up against the bank.

Q. I mean between the bank and creek the land is still there?

A. I built on the side next to me. There is some land between where I built the retaining wall and the creek, but there is a channel running through and leaves what I call an island over there next to the railroad.

Q. The creek itself, at ordinary flood, is rather shallow?

A. Yes, sir, it is shallow now.

Q. The land on your side of the creek is rather low, isn't it?

A. Well, where it broke through it is about five feet high there.

Q. About five feet above the level of the creek?

A. Yes, sir, about five feet.

Q. The soil is sandy, isn't it?

A. Yes, sir.

Q. And had you cultivated it down to the creek?

A. Yes, sir, out pretty close to it.

Q. Had you plowed it up?

A. Well, I had plowed it up, but at the time of the washout it was in grass.

Q. But corn had been planted there?

[fol. 53] A. I don't know what time; it had been three or four or two or three years that I hadn't had it in corn, that I had sowed it in grass and thought I could hold it.

Q. There had been some timber growing along your side of the creek?

A. Yes, sir.

Q. Had you cut any of it away?

A. No, sir, I didn't cut any.

Q. You didn't cut any of it away?

A. No, sir.

Q. What flood washed away this grass which you valued at $200.00, I believe?

A. The July flood.

Q. Of 1919?

A. Yes, sir.

Q. Now, Mr. Mullens, what crops were washed away besides the grass?

A. Some corn was washed down.

Q. You had had corn planted there?

A. Yes, sir, in above the wash, above where the bank cut out.

Q. There was a low bank there, was there?

A. Not where it broke through, but down in the washout, down I will say two hundred feet, I reckon, it made off a sag.

Q. And it was low where the corn was, was it?

A. No, sir.

Q. Higher there?

A. Higher there.

Q. The town of Mullens has grown up, I believe you said, right on this land, the land of your original purchase?

[fol. 54] A. Yes, sir.

Q. When did you give that gentleman who made that map the data from which he made it up?

A. I couldn't just give the date.

Q. Recently?

A. No, that has been over twelve months ago, I think.

Q. I notice the map is dated June, 1923; that is about two months ago; was it before then?

A. He got the information before then. I don't know when he made it.

Q. Did you give him the information from your memory?

A. Yes, sir.

Q. The rocks and dirt and other material in the railroad embankments conceal the original slope of the hills where this railroad is built now, doesn't it?

A. How is that?

Q. You can't go to the railroad now and see the original slope of the hills, can you?

A. In some places you can yet—well, at some places the weeds and little bushes are growing up.

Q. As they put rocks and dirt and other material to form the roadbed——

A. I mean from the slope up on the hill, from the roadbed, there is some stuff and I was noticing it this morning, there is weeds and things that was never interfered with, only made a fill up on the side of that.

Q. When they made the fill didn't they put dirt——

A. They hauled dirt in there.

Q. Hauled dirt in there?

A. Yes, sir.

Q. That would completely hide the original contour of that hill, [fol. 55] wouldn't it?

A. I reckon you don't understand me. The slope of the hill runs up, I expect, for fifty feet up there and there is some places—a place up there above the upper culvert that they built the road in the creek and covered up a whole lot of saw-logs and they was sued over it by Wittenberg.

Q. Where was that?

A. That was right above the upper culvert.

Q. Right above the upper culvert?

A. Yes, sir. They brought suit against Boxley & Toll and I was one of the witnesses in that. I think there was eight logs covered up there by the railroad fill.

Q. You say Mr. Wittenberg sued Boxley & Toll?

A. Yes, sir.

Q. Who were they?

A. The sub-contractors. I understood that Langley was the contractor and Boxley & Toll took over the work.

Q. Wasn't it Lang?

A. Well, that is——

Q. So this suit was against Boxley & Toll?

A. Yes, sir, for covering up their saw-logs.

Q. But you haven't got to an answer to the question. What I want to know is if they haven't put a lot of dirt and rocks and other material along that roadbed and formed an embankment so as to conceal, and does that not conceal slope of that mountain side from present observation?

A. Well, yes, from the creek you couldn't see it. Yes, from the creek up to the top of the railroad you couldn't see it.

Q. You couldn't tell where the original channel of the creek was now, could you?

A. I think I can come in two feet of it.

[fol. 56] Q. I know, but I am talking about looking at it?

A. That is my answer.

Q. I was talking from looking at it?

A. From looking and observation. A big stone fell out of the cliff and struck in the middle of the creek and it is there yet.

Q. That locates it at one point?

A. Yes, sir, and above that the saw-logs were covered up and I happened to be familiar with it and they had me as a witness and I saw it.

Q. The saw-logs are not there now?
A. I think they are rotten.
Q. That was twenty years ago?
A. Yes, sir. There was no cut in the hillside at that place until the bed was made in the creek.
Q. That was above this place?
A. That is above where this washout was.

Redirect examination.

By Mr. Toler:

Q. Mr. Mullens, you were asked about the development of the country in and around Mullens. When you first moved to this tract of land, about 27 or 28 years ago, all that section in there was a farming country, was it not?
A. Yes, sir.
Q. There was no coal being mined and shipped?
A. No, sir.
Q. Do you know why the Deepwater Railway Company built its railroad?
A. Well, I suppose they built it on account of the coal.
[fol. 57] Q. Do you know whether or not they built it in order to develop the town of Mullens and to increase the value of your land?
A. Well, I heard some of the—I couldn't state who it was talking, that they would capture that territory, that coal territory up there.
Q. I say do you know whether or not they built it in order to increase the value of your land?
A. I don't think they did.
Q. Do you know whether they built it for your benefit and for the advantage of yourself?
A. I don't think they did for my advantage.
Q. You didn't ask them to build it, did you?
A. No, no.
Q. Of course you were glad they did build it?
A. Yes, sir, I was glad they built it. I assisted them all I could.
Q. This road was built all the way from Norfolk, Virginia, through to Deepwater, was it not?
A. I think it started out from Deepwater and come through this way and went to Norfolk. That was the line that they built down—I believe that run only about near Elmore. That contract, I think, the way I understood it, Mr. Lang, or whatever his name was, had the contract, I understood, right about Elmore at that time.
Q. Well, all the land around there, as well as your land, has considerably increased in value, has it not?
A. Yes, sir.
Q. Did any land around there on which the town now sets, or a part of the town, increase through which the railroad didn't pass?
[fol. 58] A. How is that?

Q. Is there any land on which a part of the town of Mullens sets now that has increased considerably in value through which the railroad did not pass?

A. Oh, yes, all land up there has increased in value.

Q. How much in cash did the railroad company pay you for the right-of-way that you conveyed them?

A. I don't believe the dollar was passed; I don't believe I got it.

Q. That was merely recited in the deed?

A. Yes, sir.

Q. And the real consideration for the right-of-way that you gave them was for the construction of the depot on your land there?

A. Yes, sir.

Q. When you were calculating the damage done to your land by washing it away, did you base your conclusions and the answers that you gave this morning on the value of it as it existed in 1921, at the time this suit was instituted, or at the present time?

A. Well, at the time this suit was instituted I put the value on it.

Recross-examination.

By Mr. Wingfield:

Q. Why did you put in your deed that the railroad company should build a depot on that land?

A. The reason that I put that in the deed was because I wanted one built there.

Q. Why did you want one built there?

[fol. 59] A. I thought it would be an advantage to me.

Q. What kind of an advantage would it be to you?

A. Of course I thought it would cause the lots to be more valuable.

A. B. Workman, another witness introduced by the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Toler:

Q. State your name to the jury?

A. A. B. Workman.

Q. Where do you live, Mr. Workman?

A. I live at Ittman.

Q. How old are you?

A. Sixty-two the 27th of this month.

Q. Ittman is a short distance below Mullens, on the Guyan River, in this county, is it?

A. Yes, sir, something over two miles.

Q. Did you ever live in the town of Mullens, Mr. Workman?

A. A short time; about a couple of months, I guess.

Q. How long have you lived in and around and near to what is now the town of Mullens?

A. Well, with the exception of about three years, I have lived in and around and about Mullens for about forty years.

Q. Are you acquainted with Slab Fork Creek as it runs through and by the tract of land owned by A. J. Mullens and on which he has resided for about twenty-five years?

[fol. 60] A. I am.

Q. Where were you when the railroad that goes up and down Slab Fork now, and owned by the Virginian Railway Company, was constructed?

A. I lived up this river about eight miles above here.

Q. During that time did you have occasion to and did you visit the town of Mullens, or what is now the town of Mullens, often?

A. I did.

Q. Are you acquainted with the tract of land which lies between the A. J. Mullens First Addition to the town of Mullens and the A. J. Mullens Second addition, on which A. J. Mullens' residence is now located?

A. Yes, sir.

Q. Are you acquainted with the location of Slab Fork Creek with reference to where the railroad track that goes up that creek is located immediately back of his residence?

A. I am.

Q. I will ask you to state whether you were acquainted with the location of the bed and channel of that stream as it existed prior and up to the time of the construction of that railroad at that place?

A. I am.

Q. And were you acquainted with it prior to the building of the railroad and up to the time the road was built?

A. Yes, sir.

Q. I will ask you whether there was any cliff or rock of other conditions there at that time that enables you to determine at this time where it was located?

A. You mean the bed of the creek?

Q. Yes, sir?

[fol. 61] A. Well, the bed of the creek followed a cliff around up Slab Fork, or down or whatever way you might determine it, for a distance of 75 or 80 yards.

Q. Are you acquainted with the present location of two culverts or drains under the railroad track immediately back of where Mr. Mullens now resides?

A. Yes, sir.

Q. Where was this cliff of which you speak located with reference to those two culverts?

A. The upper end of the cliff going up the way commenced between the two culverts and extended down a little below the lower culvert.

Q. Prior to the construction of this railroad and up to the time it was constructed did you ever observe any change in the bed or channel of that stream at that point?

A. Yes, sir.

Q. Prior to the construction of the railroad?

A. No, not prior to the construction of the railroad. It run around the edge of that cliff.

Q. Have you noticed any change in the location of the channel or bed of that stream since the railroad was constructed?

A. Yes, sir, I have.

Q. Where was the original bed or channel of the stream at the time and before the railroad was constructed, Mr. Workman, with reference to where the railroad track is now located?

A. The railroad track now is right where the bed of the creek used to run for a distance of 75 or 80 yards.

Q. Where is that with reference to these two culverts?

A. Well, the upper end of the cliff commenced between these two culverts and extended down a little below the lower culvert.

[fol. 62] Q. How far from the upper culvert did the cliff commence?

A. Well, I never measured it and I couldn't give the exact distance.

Q. About how far would you say?

A. Well, I would say 50 or 60 yards.

Q. Did you have occasion to visit this place before the construction of this railroad, Mr. Workman?

A. Yes, sir, frequently.

Q. What did you do there?

A. I was fishing.

Q. Was the water flowing through there in a shoal, that is over rough rocks, or was there a hole of water there?

A. Well, there was a lot of shoals all along up by the side of that rock.

Q. Do you know whether it was known by any particular name or not, the hole of water along there?

A. No, I don't remember any particular name.

Q. Have you been there recently?

A. Yes, sir. I come along that road yesterday from Clora.

Q. Did you come down the railroad track?

A. Yes, sir.

Q. Mr. Workman, basing your statement on your knowledge of the location of the original channel of that stream and the banks of it, I will ask you to state about what part of the original bed of the stream is now covered up by the railroad fill and track?

A. All that part of the bed of the creek that was around that cliff.

Q. I mean about what portion of the width of the original bed?

A. Well, I think it was about all filled up.

[fol. 63] Q. And how far would you say that would extend from the upper culvert?

A. Well, I couldn't give any definite distance.

Q. I mean with reference to the lower culvert?

A. How far it would all be?

Q. Yes?

A. The distance?
Q. Yes?
A. Well, I think it is 75 or 80 yards.

Cross-examination.

By Mr. Hall:

Q. Do I understand you to say that at the point of this cliff you speak of the bed of the creek was filled by the building of the railroad there?
A. Yes, sir, the railroad bed sets where the bed of the creek used to be.
Q. It filled the entire bed of the creek, did it?
A. Yes, sir.
Q. Now, how did you go in from your home into what is now the town of Mullens in the early days of the building of the railroad by the road that now runs in front of Mr. Mullens' house?
A. I went up the river. I lived below, about six miles down the river below Mullens.
Q. When you passed this particular point before the construction of the railroad where did you go to, how near to this cliff?
A. I come down the river at that time At that time I lived above Mullens, up on the river.
Q. I tried to get out how you came down the river?
[fol. 64] A. Come down the path.
Q. Alongside of the cliff?
A. Yes, sir, come around the side of the narrows over a high cliff.
Q. Up on top of the mountain?
A. This was on the river as I come down Slab.
Q. How did you pass A. J. Mullen's house when you did have occasion?
A. He lived on the right of the road, on top of the bank from the river.
Q. Did you go on the side of the creek Mr. Mullens' house is now or on the side of the creek where the railroad is?
A. I didn't have to go to his house now to get to his house then; he lived at the mouth of Slab in the bottom.
Q. Did you ever go alongside the cliff where the railroad now is?
A. Many a time; yes, sir.
Q. How did you walk, on top of the mountain?
A. I crawled through the laurel and brush.
Q. Wasn't there a bank of the creek there then?
A. Yes, sir, that cliff was there then.
Q. You never used a path to walk on?
A. No, sir, there was no path there then.
Q. I am trying to get myself straight. I want to know how you got past this cliff?
A. When the water was low I walked up the creek bed, on the rocks.
Q. You walked in the creek bed, did you?
A. Yes, sir.

Q. Are you any relation to Mr. Mullens?
[fol. 65] A. No, sir.
Q. Is there any family connection between your family and Mr. Mullens' family?
A. Yes, sir, we have children married through each other.
Q. Your son married his daughter?
A. My son married his daughter and my daughter married his son.
Q. Then there is a double family connection?
A. Well, they doubled up that way.

U. T. WICKLINE, another witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Toler:

Q. Where do you live, Mr. Wickline?
A. At Wyco.
Q. Did you ever live in the town of Mullens?
A. Yes, sir.
Q. When and how long did you live there, Mr. Wickline?
A. I lived in the town of Mullens about eight years.
Q. Are you acquainted with the tract of land lying between the A. J. Mullens First Addition to the town of Mullens and the A. J. Mullens second addition, on which Mr. Mullens has resided for some time past?
A. Yes, sir.
Q. During the time that you lived in the town of Mullens what business were you engaged in?
A. Masonry work principally.
[fol. 66] Q. Are you acquainted with the location of the Virginian Railway that extends up along Slab Fork Creek?
A. Yes, sir.
Q. I will ask you if you ever procured any stone out of Slab Fork Creek just behind the residence of Mr. Mullens for use in your masonry work?
Q. When was that?
A. Well, it must have been along about 1914, I think, or 1916, or somewhere along there.
Q. What kind of stone was that?
A. Well, it was boulders that were shot out of a cliff.
Q. Where were they with reference to the railroad track?
A. Well, they was right close to the railroad track, in the creek.
Q. In Slab Fork?
A. In Slab Fork; yes, sir.
Q. Are you acquainted with the location of two culverts under the railroad track just behind Mr. Mullens' residence?
A. Yes, sir.

Q. Where did you find this stone with reference to these culverts?
A. Well, it was between the culverts.
Q. What quantity of stone did you find there?
A. Well, there was plenty of it, plenty of stone.
Q. What can you say with reference to the size of the boulders that you found there, Mr. Wickline?
A. Well, I found them as much as five and six yards—cubic yards.
Q. Could you give the jury an idea of their size by giving their [fol. 67] length, width and thickness of some of the largest ones?
A. Well, I remember that I worked one there that was something like nine feet square.
Q. Was that rock just loose, you say, in the river bed there by the railroad track?
A. Yes, sir.
Q. Was there anything there to indicate where the rock had come from?
A. Why, they were shot out of a cliff right there.
Q. Did you see the cliff?
A. Yes, sir.
Q. Where was it located with reference to the railroad track and where you found it in the bed of the creek?
A. Right on the opposite side.
Q. Of the railroad?
A. Yes, sir.
Q. Now, did you find quite a number of stones in the river there at that time?
A. Yes, sir.
Q. Were there many half as large as that?
A. Yes, sir, lots of them half as large as that.
Q. Did you remove all of the stones of that kind that you found there?
A. No, sir, nothing like it.

[fol. 68] Cross-examination:

Q. Were you getting stone out of the creek for building purposes?
A. Yes, sir.
Q. You got what you needed there, did you?
A. Yes, sir.
Q. You broke up this stone nine feet square that you speak of?
A. Yes, sir.
Q. Now, that was nine feet square—the stone was about three feet high?
A. Yes, it was higher than that. We estimated it was something like nine cubic yards of masonry in it. The stone wasn't exactly square, but there was about nine cubic yards in it.
Q. It is nothing uncommon for the bed of the creek to have stones as large as that?
A. You don't often find a natural stone that large.
Q. How long did you work there?
A. Well, I got stone out of the creek there two or three different times. I don't remember exactly how long I worked at it.

Q. Did I understand you to say the stones were thrown across from the railroad track?

A. Yes, sir.

Q. On Mr. Mullens' side?

A. Yes, sir, in the creek; they were in the creek or where the creek is now.

Q. Did you say that they had been thrown on the other side of the creek from the railroad?

A. No, sir.

Q. What did you say about that?

[fol. 69] A. I said they had been shot down there in the creek and I taken them out of the creek.

Q. How much stone did you get out of there?

A. Well, I don't remember exactly. I got out something like 25 or 30 cubic yards for Mr. Mullens there and then I hauled some more rock.

Q. Did you buy the stone?

A. The work was principally for Mr. Mullens.

Q. Did you buy the stone for the building purposes?

A. No, sir.

Q. He used the stone, did he?

A. He used the stone for his work principally.

Q. Did you roll any stone down from the railroad right-of-way into the creek where you could get it?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. You never got any stone off of the railroad right-of-way?

A. No, sir.

A. J. MULLENS, the plaintiff, being recalled in his own behalf, testified as follows:

Direct examination.

By Mr. Toler:

Q. Mr. Mullens, you spoke of having a m-son to estimate the cost of building a wall to protect your land against the encroachment of this water?

A. Yes, sir.

[fol. 70] Q. Who was this mason?

A. It was Mr. Cody.

Q. Is that G. Z. Cody?

A. Yes, sir.

Q. Is he summoned here as a witness?

A. Yes, sir.

G. Z. Cody, another witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Toler:

Q. Mr. Cody, you heard the testimony of Mr. Mullens with reference to his having called upon you to make an estimate of the cost of constructing a wall for the protection of his land there back of where he resides. I will ask you to state whether or not that is correct?

A. Yes, sir.

Q. Did you inspect and look over the situation there with a view of determining what it would be worth to construct that wall?

A. Yes, sir.

Q. Will you please state what, in your opinion, it is worth to construct a wall there such as would be necessary to protect that property?

(Objected to by counsel for defendant; which objection the Court overruled; to which ruling of the Court the defendant, by counsel, at the time excepted.)

A. Mr. Mullens wants 1,200 lineal feet of wall, 8 feet high, averaging 3 feet thick, 4 feet at the bottom and 2 feet on top, plenty of [fol. 71] footing on top in case it is necessary to rise a foot or more, and 1,200 lineal feet of wall is 1,244 cubic yards, wet wall. The best I could do for him or anybody else is $9.75 a yard.

The Court: And 1,244 yards?

A. Yes, sir, at $9.75 each yard. Then there is 1,066 cubic yards of excavation, generally all wet. The ruling prices would be for excavation, the kind of material over there and removing is pretty bad in the creek, I made it at $2.00 a cubic yard, and it will go up to—no, I am mistaken, wait a second. There are 533 cubic yards of excavation at $2.00 which will make $1,056.00. That is my estimate for the old man.

Q. Now, for the benefit of the jury, just tell the total amount that you deem necessary for the construction of this entire wall?

(Objected to by counsel for defendant; which objection the Court overruled; to which ruling of the Court the defendant, by counsel, at the time excepted.)

A. $13,194.00 for 1,200 lineal feet of that kind of wall, I mean cement wall.

Q. What experience have you had in doing such work as that, Mr. Cody?

A. Oh, I have been working as a mason all my life. I never changed my trade; I started with it when eleven years old and I am forty-eight next month.

Q. You are basing your answer on the prevailing wages and cost of materials as they existed at the time in the town of Mullens?

A. Yes, sir.

Mr. Toler: I will state that the only object in offering this evi-
[fol. 72] dence, and I would like for the Court to so instruct the jury, is bearing on the question of the requirements of the plaintiff to take the steps necessary to protect his property, and it is not offered and the jury is not asked or proposed to consider it in any way in arriving at the damages done to the plaintiff's property.

Cross-examination:

Q. When did you make this estimate, Mr. Cody?
A. I made this one on the rule of prices we get today.
Q. You made it for the purpose of this suit?
A. Yes, sir.
Q. Now, that wall goes around the entire front of his property 1,200 feet?
A. That is what he told me he is supposed to have it, to be safe.
Q. That is about as fine a wall as you can make, isn't it?
A. Yes, sir.

Redirect examination:

Q. I will ask you if you didn't make a like estimate about three years ago?
A. I did, about $4,000.00 less or a little over.
Q. At that time?
A. Yes sir. I don't know — long *long* it is, but I know I done it and we had the labor and low wages and everything low to what it is today, a whole lot.

[fol. 73] O. L. Collier, another witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Toler:

Q. State your name to the jury?
A. O. L. Collier.
Q. Where do you live, Mr. Collier?
A. At Mullens.
Q. How long have you lived in Mullens?
A. About eight years.
Q. What is your business or profession?
A. Civil and mining engineer.
Q. How long have you been engaged in the practice of that profession?
A. Something over twenty years.
Q. Are you a graduate of any school or college of engineering?
A. Not a graduate. I went to Cornell University.
Q. How long?
A. Two years.
Q. Are you acquainted with the tract of land lying along Slab Fork Creek, in the town of Mullens, in this county, between the A.

J. Mullens First Addition to the town of Mullens and the A. J. Mullens Second Addition, on which Mr. A. J. Mullens now resides?

A. I am acquainted with this property.

Q. I will ask you to state whether or not you have ever been called upon to make a survey of the property there, showing the present location of the channel of that stream and the locations as they existed prior to the construction of the Virginian Railway that extends up and down Slab Fork at that place?

[fol. 74] A. I was requested to make a survey of this property.

Q. When were you first requested to make this survey, Mr. Collier?

A. It was something over two years ago; I couldn't recall just the exact date, but I believe it was in May or June of 1921.

Q. I will ask you to state whether you have made such a survey?

A. I have made such a survey.

Q. Did you locate the railroad track and right-of-way with reference to the present location of the channel or channels of Slab Fork Creek?

A. I did.

Q. I will ask you if you located in any way the channel of Slab Fork Creek as it existed prior to the construction of the railroad at that place?

A. I did show this stream.

Q. From what information did you make that survey?

A. Partly from information on the ground and partly from the location as pointed out to me by A. J. Mullens.

Q. I will ask you to state whether or not you have made a map showing the result of your survey and measurements?

A. I have made a map.

Q. I will hand you a map, dated June 21, 1923, and entitled "Map showing encroachment of Slab Fork on the property of A. J. Mullens" and will ask you to examine that map and state whether or not that is the map which you made?

A. That is the map I made.

Q. I will ask you to state whether or not that map correctly shows [fol. 75] the measurements and survey of the conditions as you found them and as they were pointed out to you by Mr. Mullens?

A. It does show this information.

(At this point counsel for the plaintiff offers the map in evidence and the same was properly marked.)

Q. I will ask you to take this map, Mr. Collier, and point out to the jury, designating by the colors or otherwise the lines or location of the original channel of Slab Fork Creek as is shown on your map?

A. This portion of the map that is colored yellow represents the east side of Slab Fork Creek as the original channel, part of which was determined by actual location on the ground and a part of this information was given to me by A. J. Mullens.

Q. You refer to the east side; do you mean the side opposite to the land of the plaintiff?

A. Yes, sir, opposite to the land of the plaintiff.

Q. I will ask you to point out on the map and designate the line which indicates the bank of Slab Fork as the original channel was located?

A. This section shaded in green along here and the section along in here. There is a section that is the original channel, but there is a portion of this channel that it was impossible to locate as the original west bank of the creek.

Q. You have stated you located the original channel and banks of this creek partly from information that you found on the ground and partly from information given you by A. J. Mullens. I will ask you to point out on the map, if you can, and state what you found on the ground to indicate the location of the original channel and bank?

A. At this point here to this point here is the location of the original bank, and from this point here down to the edge of the map is the original bank of the east side of Slab Fork.

[fol. 76] Q. I will ask you to state what the area shaded in light yellow on the map indicates, Mr. Collier?

A. This area in light yellow indicates the area of encroachment which has been caused by the water overflowing the banks.

Q. Did you calculate the area of the land that has been washed out to determine the number of acres it contains?

A. I did.

Q. Will you please state what amount of land has been washed away according to your calculation?

A. Well, there has been washed out 2.35 acres of property has been damaged, what I mean has been affected by this encroachment.

Q. Is that the area that is shown in yellow?

A. No, the area shown in yellow is the area that has been encroached upon, but that is not the 2.35 acres.

Q. What does the 2.35 acres include?

A. The 2.35 acres includes this portion on the map that is shaded in red.

Q. What is the condition of the surface of the land that is shaded in yellow?

A. It has the appearance of the bed of the creek; it is rocky and has boulders.

Q. Between the land that is shaded in yellow and the area indicated as the channel of Slab Fork I notice some light colored area, and I will ask you to state what is the nature and condition of that land?

A. This section that is marked here in this boundary represents an island and is the original land of this property. There has been no damage done to that; there has been no washing done on the top of this property here; in other words this remains as the original surface.

[fol. 77] Q. Are you acquainted with the location of the block of lots known as the H. E. Lilly Addition to the town of Mullens?

A. I am.

Q. Will you point out on the map where that is located?

A. The property of the H. E. Lilly Addition begins at this line here and extends in a southerly direction below the property of A. J. Mullens, this being the boundary line between H. E. Lilly and the A. J. Mullens Addition.

Q. I will ask you what land or territory has been affected by the encroachment of the water there exclusive of the area contained in the H. E. Lilly Addition?

A. 1.85 acres.

Q. And the amount in the H. E. Lilly Addition would be the difference between——

A. 2.35 and 1.86, or .49 of an acre.

Q. I will ask you to state whether the map shows all of the H. E. Lilly Addition?

A. It does not show all of the H. E. Lilly Addition.

Q. How much does it lack?

A. I would say about 250 feet.

Q. In length you mean?

A. In length.

Q. Mr. Collier, did you make any calculation or any measurements and calculations for the purpose of ascertaining the quantity of soil and dirt that has been washed away from this land by the encroachment of the water?

A. I did.

Q. Will you please state the quantity you found that has been washed away from the tract of land now opened by the plaintiff and also the quantity from the H. E. Lilly Addition?

(Objected to by counsel for defendant as to the H. E. Lilly Ad-
[fol. 78] dition; which objection the Court overruled for the time being; to which ruling of the Court the defendant, by counsel, at the time excepted.)

A. There are 7,068 cubic yards of material that has been taken from the property of the A. J. Mullens tract and there has been 1,033 yards taken from the H. E. Lilly tract that is shown on this map, which does not include all of the H. E. Lilly Addition, and that makes a total of 8,101 yards.

Q. How did you arrive at this, Mr. Collier?

A. There is a section of this that can be accurately arrived at and another section of it that was an approximation on my part. The section that can be accurately arrived at is the section from H-1 down to OO-1, or to the boundary line between A. J. Mullens and H. E. Lilly Addition. The section that was approximated was from AA down to HH-1.

Q. Now, explain, Mr. Collier, why you had to approximate the one section and how you got at the other section more accurately?

A. This can be accurately gotten because we have the original surface on either side of the channel that forms the encroachment, while this to the north of this point there is no evidence of the original surface, with the exception of about two places, and for that reason I could only approximate what this yardage would be.

Q. What evidence of the original surface did you find at the two places you referred to?

A. There are trees still standing on this section of the property; the earth has been washed away from the roots of the tree, but the trunk is still standing and which base of the trunk would show the original surface of the property.

Q. I notice on the map some sectional markings, colored in yel-[fol. 79] low, and will ask you to state what they indicate, Mr. Collier?

A. These sections, as shown here and here, represent the cross section of the property at the points HH-1, II-1, JJ-1, KK-1, LL-1, MM-1 NN-1 and OO-1, which are shown in these sections here, H, I, J, K, L, M, N and O.

Q. What does the other sectional markings refer to?

A. This section PP-1 represents the section taken below the property of A. J. Mullens or on the H. E. Lilly Addition.

Cross-examination.

By Mr. Wingfield:

Q. Mr. Collier you have lived in the town of Mullens for some time?

A. About eight years.

Q. You are familiar with the lay of the ground around the town?

A. Fairly so.

Q. Isn't it a fact that there are some places in the town of Mullens where this creek has been up and the water has washed that are considerably removed from the railroad?

(Objected to by counsel for plaintiff; which objection the Court overruled; to which ruling of the Court the plaintiff, by his counsel, at the time excepted.)

A. I don't know whether I thoroughly understand your question.

Q. Isn't there a depression in the ground in the town of Mullens that has been caused by this creek, down there, I believe, below the moving picture show, that runs across the street?

(Objected to by counsel for plaintiff; which objection the Court overruled; to which ruling of the Court the plaintiff, by his counsel, at the time excepted.)

[fol. 80] A. There is.

Q. And there are depressions at other places along the creek that has been caused by the high water in this creek, are there not?

(Objected to by counsel for plaintiff; which objection the Court sustained; to which ruling of the Court the defendant, by counsel, at the time excepted.)

A. Not that I know of, or not that I recall right now.

Q. Isn't there one above this wash that extends for a considerable distance over near the bridge across the creek above this place and

that extends down and in front of Mr. Mullens' house and on down practically to the next bridge?

(Objected to by counsel for plaintiff. No ruling.)

A. You mean on the side of Mr. Mullens' house next to the river?

Q. Yes, sir?

A. I think that is caused by a spring.

Q. You think that is caused by a spring?

A. Yes, sir.

Q. There is a depression there?

A. There is no channel in evidence above this spring that I know of.

Q. Isn't it about 20 feet wide?

A. It varies in width, caused by this spring, I think.

Q. There is another hole or channel some distance below there, isn't there?

(Objected to by counsel for plaintiff; which objection the Court overruled; to which ruling of the Court the plaintiff, by his counsel, at the time excepted.)

A. There is, either that or the same channel.

[fol. 81] Q. Either that or the same channel?

A. Yes, sir.

Q. It comes in about Dr. Steel's residence?

A. Yes, sir, it flows under his residence.

Q. Now, you stated between certain points your line of the original east channel of this creek was made entirely from data supplied by Mr. Mullens?

A. It was.

Q. That, as I understand it, was between the line I mark here about this point, which we will mark or beginning at the letter "E" in the word edge, the old channel extends then southerly to a point we will mark in pencil "X"; between those points your data as to the original eastern edge of the old channel is arrived at entirely from information derived from Mr. Mullens, isn't it?

A. Practically so.

Q. The roadbed that has been constructed along there obliterates the original line of hillside, doesn't it?

A. It does.

Q. Your estimate of the cubic feet of the land washed away, I believe you said, is partly a mere estimate?

A. It was.

Q. And in that estimate did you assume that the land originally was level between the two points that you assume as the original level of the land?

A. Where this original surface was shown of the ground I did. Where it was approximated I took the top of the section as sloping towards the stream on a drop of three feet from what the original surface shows.

Q. You assumed that the bank was three feet from the level of this stream?

A. In other words I assumed the bank at the creek channel now [fol. 82] was three feet lower than what the original surface is as shown on this map.

Q. As a matter of fact, the bank along these mountain streams are more or less irregular?

A. They are.

Q. And you can't arrive at that accurately?,

A. Not accurately, no; it is an approximation, of course.

The plaintiff, by counsel, here offers in evidence a deed dated the 2nd day of April, 1907, between the Deepwater Railway Company, a corporation, referred to in the deed as the Deepwater Company, and the Virginian Railway Company, referred to in the deed as the Virginian Company, and now recorded in the office of the Clerk of the County Court of Wyoming County, West Virginia, in Deed Book No. 41, at pages 304, etc. Which deed so introduced in evidence being in the words and figures following, to-wit:

(Here insert deed.)

And thereupon the plaintiff rested his case.

[fol. 83] Thereupon the defendant, to maintain the issue upon its part, introduced before the Court *the* jury the following evidence, to-wit:

WILLIAM REZONIKER, a witness for the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Howard:

Q. What is your name?

A. William Rezoniker.

Q. Where do you live, Mr. Rezoniker?

A. At Mullens.

Q. How long have you lived there?

A. About eight years.

Q. Are you acquainted with the land that is alleged to have been damaged in this suit?

A. Yes, sir.

Q. Have you had any experience in buying and selling real estate in the town of Mullens?

A. Yes, sir.

Q. What is your occupation?

A. Contractor and real estate.

Q. A building contractor?

A. Yes, sir.

Q. You have heard the evidence of Mr. A. J. Mullens in this case, have you not?

A. Yes, sir.

Q. Mr. Mullens stated in evidence that the area damaged by the overflow of this water would cover a space that would make about fifteen lots, and that those lots were worth now about $1,500.00 apiece; do you know what those lots were selling for, or lots in that locality were selling for, in 1921, when this suit was brought, in [fol. 84] June, 1921?

A. Well, I bought some lots there adjoining, in the H. E. Lilly Addition there.

Q. Just below this washout?

A. Yes, sir, adjoining this washout.

Q. What did you pay for those lots?

A. $500.00.

Q. When did you buy those lots?

A. I believe it was in 1921; either 1920 or 1921.

Q. Were those Lilly lots as valuable as this land of Mullens that has been damaged in this suit?

A. Well, I believe they are; yes, or may be a little more. They are a little closer to the town and hasn't been damaged by the water as much as the other lots.

Q. From your dealings in real estate in Mullens and your knowledge of the prices in that locality, in June, 1921, would you consider those lots worth more or less than $500.00 apiece at that time?

A. About the same.

Q. About $500.00?

A. Yes, sir.

Q. It has been testified in this case as to the flood called the ice flood; do you know when that flood took place?

A. It was in February, 1918.

Q. What is the nature of that land along there where these lots are, Mr. Rezoniker?

A. Just a sandy bottom.

Q. A sandy bottom?

A. Yes, sir.

Q. Is there is a bridge made in a sandy bottom like that it is very easy to wash away, isn't it?

[fol. 85] A. Yes, sir.

Q. It is in testimony in this case that the first washing took place in 1918, that the first appreciable washing took place in 1918, during that ice freshet; was there any freshet after the ice freshet as large or larger than the ice freshet?

A. Well, there has been several after that; yes, sir.

Q. When was the next freshet after that of any size?

A. I don't remember exactly the year, but I lived close to the creek myself and I know we had several pretty high waters after that.

Q. Mr. Mullens testified that the freshet in 1918 started the washing at this point and that the following freshet, in July, 1919, did this washing out; do you remember that freshet of 1919?

A. Yes, sir.

Q. Have you ever seen any larger freshets since you have been on Slab Fork?

A. No, sir.

Cross-examination.

By Mr. Toler:

Q. Mr. Rezoniker, where did the lots that you purchased in 1921 for $500.00 lay?

A. Where Mr. Lewis' home is now.

Q. In the H. E. Lilly Addition?

A. Yes, sir, W. M. Lewis.

Q. That was land that had been washed, too, was it not?

A. No, sir.

Q. There was no washing done there?

A. No, sir, no washing done at all there.

Q. How many of those lots did you buy?

[fol. 86] A. I bought two, and then I sold two for him.

Q. What did you get for the ones you sold?

A. I got $750.00 for one and $550.00 for the other one.

Q. That was in 1921?

A. I believe it was in 1921; yes, sir.

Q. There has been a considerable and steady increase in the value of lots all along ever since you have been there?

A. Yes, sir.

Q. They are very considerably higher now than in 1921?

A. Yes, sir.

Q. Isn't it a fact that Mr. Lilly, during the time he owned the H. E. Lilly Addition, had put in an abutment there to protect the lots where you refer to, to keep the water from running around them?

A. I don't remember that.

Q. You don't know about that?

A. No, sir.

Q. And I believe you say that there has been no washing on these lots that you bought?

A. No, sir. The water has been over the lots there when we had them high floods, but didn't damage the lots any.

[fol. 87] J. A. MACE, another witness for the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Howard:

Q. What is your name?
A. J. A. Mace.
Q. Where do you live, Mr. Mace?
A. I live at Athens, West Virginia.
Q. Did you ever reside in Wyoming County?
A. Yes, sir.
Q. Where did you reside in Wyoming County?
A. I lived down here at Baileysville, in Wyoming, one year, and then I boarded here at the hotel at Pineville for two or three years.
Q. Have you ever resided anywhere else in Wyoming County?
A. I lived on Turkey Creek down here a while.
Q. Did you ever reside on Slab Fork Creek?
A. Yes, sir, but I lived in Raleigh County.
Q. Just across the line?
A. Yes, sir.
Q. How long did you live there on Slab Fork Creek?
A. I lived there sixteen years.
Q. Sixteen years?
A. Yes, sir.
Q. Have you ever bought or sold any real estate in the town of Mullens?
A. I have.
Q. You have dealt quite largely in real estate there, haven't you?
A. Well, a right smart; largely for my capacity.
[fol. 88] Q. You are pretty well acquainted with values there, are you not?
A. Fairly well.
Q. Do you know the location of this piece of land in controversy in this suit?
A. Yes, sir.
Q. It is in evidence in this suit that the land that has been washed or damaged would, if cut up into lots, have made about fifteen lots. What would those lots have sold at about June, 1921, what were they worth?
A. They sold some below there for $500.00 and I was offered some at that price.
Q. Was that in what is known as the H. E. Lilly Addition?
A. Yes, sir.
Q. Are those lots more or less valuable than the land in controversy?
A. Practically the same; it was a little near- town than this is.
Q. They are fully as valuable as those, are they not?
A. Yes, sir.

Q. You were offered some for $500.00 in 1921?
A. Yes, sir.
Q. Did you consider that their full value at that time?
A. Well, I did.
Q. You didn't buy them at that price?
A. I didn't buy them at that price.
Q. Would you have bought them if you thought you were getting a bargain?
A. I would have.
Q. You say you resided on Slab Fork Creek about 15 or 16 years? [fol. 89] A. Sixteen years.
Q. Do you remember the freshet that is spoken of as the ice freshet?
A. Yes, sir.
Q. When did that take place?
A. The 2nd day of February, 1918.
Q. Was that an unusually high freshet for that creek?
A. Yes, sir, it was the highest water I ever seen except one tide after that.
Q. When was that?
A. The 13th of July, 1919.

Cross-examination.

By Mr. Toler:

Q. Did you live on Slab Fork in 1901, Mr. Mace?
A. No, sir.
Q. You don't know anything about the flood that was there then?
A. No, sir.

Redirect examination.

By Mr. Howard:

Q. You were living at Hotchkiss in July, 1919?
A. I was.
Q. Did you know anything about a man being drowned in that flood up at Hotchkiss, in 1919?
A. Yes, sir.
Q. Was that on account of the unusually high water?
A. Well, there was a washout there that washed my barn and house away, and of course it was caused on account of the high water. [fol. 90] Q. That is on the same creek, is it?
A. Yes, sir.

Recross-examination.

By Mr. Toler:

Q. Do you know of anybody else getting drowned up there?
A. No, not up there, I don't.

Q. You have information of quite a number of other people getting drowned in the county since you have been here and lived here?
A. Mr. French had a kid drowned up there and a negro woman drowned up on Barker's Creek.
Q. And you could no doubt sit here and think up numerous persons that have been drowned in this county, could you not, and other surrounding counties?
A. Yes, sir.
Q. You have read this summer about numerous people being drowned in bathing, have you not?
A. I have.

M. M. RUTHERFORD, another witness for the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wingfield:

Q. Give the stenographer your name, please?
A. M. M. Rutherford.
Q. M. M. Rutherford?
A. M. M. Rutherford.
Q. Where do you live, Mr. Rutherford?
[fol. 91] A. I live at Mullens, West Virginia.
Q. How long have you been living there?
A. Oh, about fifteen years.
Q. What is your business?
A. Well, I am a carpenter.
Q. Do you know anything about the values of real estate in Mullens?
A. Yes, sir, I know something about it.
Q. Do you know the property that is in controversy in this suit?
A. How is that?
Q. Do you know the property that belongs to Mr. Mullens that is in controversy in this suit?
A. Yes, sir.
Q. Mr. Mullens has testified that the land that was damaged would make about fifteen lots. Will you please state what those lots would be worth, or were worth rather, in June, 1921?
A. I don't know that I could state what they were worth at that time.
Q. Were you offered any lots in that vicinity about that time?
A. Well, along a little before that time I think I made a deal with Mr. Mullens for one down there for $500.00.
Q. For $500.00?
A. Yes, sir.
Q. Where was this lot you bought from him for $500.00?
A. Down in the bottom just below there; that bottom is not washed away now.

Q. Was it worth as much as these claimed to be washed away?
[fol. 92] A. Oh, yes, they was worth as much as them.
Q. About when was it you made this deal with Mr. Mullens?
A. I think it was about the year 1920. I believe; I am not sure, but it was along about that time.
Q. About 1920?
A. Yes, sir.
Q. Do you remember the big ice flood that happened there in Mullens?
A. Yes, sir.
Q. When did that flood happen?
A. My recollection is it was in 1918.
Q. What month?
A. Along in the latter part of January or the first of February; I don't remember just the date.
Q. Was that an unusually high flood?
A. Well, right there in Mullens proper it was; it was unusually high. Well, I don't know as to the water; I don't know that it was so awfully out of its banks above where the ice was gorged, but there in Mullens it was unusually high; it broke loose and come through the town rapidly.
Q. Where did the ice gorge in Mullens?
A. Out there next to the wholesale house, above the bridge.
Q. Was that the highway bridge?
A. Yes, sir. After it taken a run over town it gorged against the saplings and trees above town was the original starting of it and the ice stopping under the space at the highway bridge, and this ice was gorged there for some time.
Q. Do you remember the flood that happened in July, 1919?
A. Yes, sir.
[fol. 93] Q. Was that an unusually high flood?
A. Yes, sir, that was the most water that I have ever seen in Slab Fork.

C. H. Lovern, another witness for the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wingfield:

Q. Mr. Lovern, what is your occupation?
A. Section foreman.
Q. For the Virginian Railway Company?
A. Yes, sir.
Q. Stationed at Mullens?
A. Yes, sir.
Q. How long have you been stationed at Mullens?
A. About ten years.

Q. During that time have you been familiar with the waters of Slab Fork?
A. Yes, sir.
Q. Have you observed the water that comes down the stream?
A. Yes, sir.
Q. What is the highest freshet you have seen during that ten years?
A. Well, it was along in 1919.
Q. What month?
A. Along about July.
Q. What part of the month?
A. Well, it was along about the first of the month; I don't remem-
[fol. 94] ber the date.
Q. Is it the freshet that has been mentioned as happening about the 13th or 15th?
A. Somewhere along there.
Q. There was only one freshet in July, 1919, was there?
A. Only one.
Q. Was that a freshet of unusual severity?
A. Yes, sir, the water was higher than I ever saw it before.
Q. Did that freshet cause any wash of Mr. Mullens' land?
A. Well, I think that is the one that caused it.
Q. Had Mr. Mullens' land been washed prior to that time to any appreciable extent?
A. I couldn't tell it had been hurt any until that water broke through there.

Cross-examination.

By Mr. Toler:

Q. You don't know anything about the flood of 1918, in February, what is known as the ice flood?
A. Yes, sir.
Q. Do you know whether that washed any or not?
A. Well, it went around through there; I didn't notice where it done him much damage; it didn't seem to wash out any gullies.
Q. You mean it went down through the channel?
A. It was just a low place there; there wasn't any channel there at that time.
Q. There is now?
A. Yes, sir; this last high water is what done the most of that.
[fol. 95] Q. Did you go up there and make any particular inspection of it?
A. Yes, sir, I was all along there; I was looking after the company's properties.
Q. You looked to see whether it washed his land any or not?
A. I noticed that. You know it was close to the road and I would have seen it, of course; that ice knocked down some fence.
Q. Well, the water washed out all over the bottom?
A. Yes, sir.

Q. Were you up there during the freshet, while the flood was on?
A. Yes, sir, night and day both.
Q. What were you up there for?
A. Looking after the ice around the bridge at Traco.
Q. And while you were up there for that purpose you looked to see whether Mr. Mullens' land had washed away?
A. I didn't make any particular notice of his any more than anybody else's. I looked at all as I went along?
Q. You are positive the 1917 flood didn't wash any land?
A. It didn't wash any to amount to anything at all, I don't think.

Redirect examination.

By Mr. Wingfield:

Q. Do you know Mr. Wickline, who has testified here?
A. Yes, sir.
Q. He has testified that he moved some rock from the bed of the creek opposite Mr. Mullens' land; do you know whether or not he [fol. 96] threw any of the stone into that creek?
A. He was getting rock off of the side of the fill, and I stopped him. He was hauling the rock there out of the bed of the creek there out from Mr. Mullens' house and I stopped him at the time and he got hot about it.
Q. He rolled the rock from the side of the fill?
A. Yes, sir; he was picking out the best rock he could find all along the side of the fill.
Q. And you stopped him from it?
A. Yes, sir.

Recross-examination.

By Mr. Toler:

Q. There was quite a lot of rocks in the bed of the creek along there?
A. Yes, sir, there was, and he got some of them, too.
Q. He had used those up and had gone over on the railroad fill?
A. He was sure getting them off of the edge of the fill.
Q. And you stopped him?
A. Yes, sir.

[fol. 97] G. W. Holt, another witness for the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wingfield:

Q. Mr. Holt, where do you live?
A. I live at Corinne now.

Q. Did you live in Mullens at one time?
A. Yes, sir.
Q. How long did you live in Mullens?
A. Well, I lived in Mullens about twelve years ago; I lived there a little over a year, and then this last winter I lived in Mullens.
Q. How long have you observed the waters of Slab Fork Creek?
A. I am not so very well acquainted with the waters of Slab Fork Creek. I have been up on the other fork and lived on the other fork, I guess, altogether about twelve years, but I don't know so much about Slab Fork. I lived on Slab Fork last winter.
Q. Last winter?
A. Yes, sir, last winter I lived there a while.
Q. Do you remember this flood of July, 1919?
A. Yes, sir.
Q. How did that compare with previous floods in that valley?
A. Well, it was pretty high, but I think the highest water I have any recollection of was in 1917; that was on the other fork of the creek.
Q. Not on Slab Fork?
A. No, sir. I lived at Tams then.
Q. That was on the Guyandotte River?
A. Yes, sir, on Guyandotte River.

[fol. 98] —— Norris, another witness for the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wingfield:

Q. Mr. Norris, what is your profession?
A. Civil engineer.
Q. How long have you been practicing civil engineering?
A. Thirteen years.
Q. What is your present employment?
A. Division engineer for the Virginian Railway.
Q. How long have you been division engineer?
A. Three years and a half.
Q. Prior to that time what were you doing?
A. I was resident engineer on the Southern Railway.
Q. You were not employed by the Deepwater Railway when this roadbed was constructed?
A. No, sir.
Q. Have you examined this fill that has been the subject of this controversy?
A. Yes, sir.
Q. I hand you two deeds that have been introduced in evidence, one from A. J. Mullens and wife to the Deepwater Railway Com-

pany, dated October 10, 1902, and the other from A. J. Mullens and wife to the Deepwater Railway Company, dated July 20, 1904. You have examined those deeds before, have you not?

A. I have heard them read.

Q. Do they convey land in the vicinity of this land of Mr. Mullens that has been washed?

A. Yes, sir.

Q. About how close do they come to it?

A. They run from 30 or 40 feet out to 200 feet from this line; [fol. 99] the distance is varied.

Q. Have you examined this railroad in front of Mr. Mullens' land?

A. Yes, sir.

Q. Was that railroad constructed in accord with approved engineering standards?

(Objected to by counsel for plaintiff; which objection the Court overruled; to which ruling of the Court the plaintiff, by his counsel, at the time excepted.)

A. Yes, sir.

Q. It was constructed in the usual way of building railroads along creek banks, was it?

(Objected to by counsel for plaintiff; which objection the Court overruled; to which ruling of the Court the plaintiff, by his counsel, at the time excepted.)

A. Yes, sir.

Q. Have you from what remains to be seen on the ground, or can you state whether or not the line of the original edge of the old channel, shown on the map introduced in evidence by the plaintiff here in yellow, is correctly located on that map?

(Objected to by counsel for plaintiff; which objection the Court overruled; to which ruling of the Court the plaintiff, by his counsel, at the time excepted.)

A. It looks to me like that line shown on that map is shown as being too far into the hill.

(Counsel for plaintiff moves to strike out the foregoing answer; which motion the Court overruled; to which ruling of the Court the plaintiff, by his counsel, at the time excepted.)

Q. State why that is your opinion, Mr. Norris?

A. One reason is the slope of the original ground above the present track would lead me to believe that the original edge of the creek [fol. 100] was far-her towards Mr. Mullens' land than shown on the map.

(Counsel for plaintiff moves to strike out the foregoing answer; which motion the Court overruled; to which ruling of the Court the plaintiff, by his counsel, at the time excepted.)

Q. Are you familiar with the character of Mr. Mullens' land at the point of controversy?

A. Yes, sir.

Q. What is the nature of that land?

A. It is of a sandy, gravelly character.

Q. In your opinion would that land have washed from this flood of July, 1919, of which you have heard testimony, whether the railroad had been there or not?

A. Well, I wasn't there during that flood; I wasn't with the railroad company, but judging from the testimony that has been advanced, I would say that it would.

(Counsel for plaintiff moves to strike — the foregoing answer; which motion the Court overruled; to which ruling of the Court the plaintiff, by his counsel, at the time excepted.)

Q. Mr. Mullens' testimony is that there was a slight damage there in 1918, followed by a heavier damage in 1919. Could Mr. Mullens have protected his land from any further damage after that flood of 1918?

A. I don't know the conditions after that flood of 1918, how badly the land was washed at that time.

Q. Assuming it was only washed very slightly, could he have built a wall or something of that sort which would have protected the land from further washing?

A. Yes, sir.

Q. How much of a wall would it have been necessary for him to build?

[fol. 101] A. Well, four or five feet.

Q. Would there have been any necessity for a 1,200 foot wall?

A. I can't see any.

Q. Would it have been necessary to build that wall out of stone and concrete?

A. No, sir.

Q. A very much cheaper form of construction could have been employed, could it not?

A. Yes, sir.

Q. What sort is customary to employ in this country?

A. Well, the railway company the construction consisting of bridge ties and large broken rock and make a cribbing out of that.

Q. Is that form cheaper than the solid stone wall?

A. Yes, sir.

Q. Does it hold the banks in these streams?

A. Yes, sir.

Q. How much cheaper is the cribbing that you have described than the solid wall?

A. I would say fifty per cent.

Q. Is it necessary to have a solid wall as much as four feet thick at the base?

A. No, sir.

Cross-examination.

By Mr. Toler:

Q. Mr. Norris, such a wall as you mention, built out of wooden cribbing and stone would only be a temporary wall, would it not?

A. Well, it would be more or less permanent, I would say, [fol. 102] because the bulk of it consists of rock.

Q. That wood would rot, wouldn't it?

A. The wood would rot but the rock would still remain there and dirt would form around that and make it more or less permanent.

Q. Is that true where there is a heavy current of water in a stream like Slab Fork thrown squarely against it?

A. Well, we have employed it to protect some of our own property right below Mullens.

Q. Where?

A. Between Mullens and Elmore, back of the new houses we have recently built there.

Q. Oh, that is built along with the current of the water, is it not, or approximately so?

A. In a general way it is.

Q. And as long as that stands it would protect the wall?

A. Yes, sir.

Q. Or protect the bank I mean?

A. Yes, sir.

Q. But that wood would naturally rot out and the wall would then come down; you just threw loose stone in there?

A. Well, the rock would remain in position.

Q. All of it?

A. Well, yes, I would say that it would remain there and the dirt would form around it and it would form a protection for the bank.

Q. That is not what I am asking you. Suppose there is a heavy current of water coming against the wall and there was no dirt over behind it across the channel of a stream, then what would you say about it?

[fol. 103] A. Very often when you construct the cribbing dirt fills in behind the cribbing.

Q. If dirt doesn't fill in behind it and it is left there with nothing but the wall across the channel of the stream?

A. It might be knocked over, but it would still afford some protection, I would say.

Q. Well, after the wood would rot out or get knocked out, then the rocks would come down, would they not, to some extent at least?

A. To some extent; yes, sir.

Q. Now, did you ever make any personal survey of the conditions here at this place, Mr. Norris?

A. I have never taken any actual measurements, but I have observed it.

Q. You have gone over and looked it over?
A. Looked it over.
Q. When did you go there?
A. About two months ago.
Q. Was that the only time you have ever been there?
A. No, I have been there two or three times.
Q. For the purpose of looking over this situation?
A. Yes, sir.
Q. Since this suit was started?
A. Yes, sir.
Q. You were never there before the institution of this suit in June, 1921?
A. No, sir.
Q. And you have never been consulted about this?
A. No, sir.
Q. And when you say you think this yellow line on the map here made by Mr. Collier, which purports to show the eastern bank [fol. 104] of the original channel, you are just speaking from what appears to you there now?
A. Yes, sir.
Q. Right here under the letter "e" in the word "edge of old channel" there is an X mark. When you were there did you observe that that was the old bank, the old eastern bank of the old channel?
A. You couldn't observe it at that time, and I did not.
Q. You didn't observe that?
A. No, sir.
Q. Then when Mr. Collier says he found the old bank there, he is mistaken in your opinion?
A. Well, I don't say he is mistaken at that point. I say as a general thing the line of the original edge of a creek seems to be too far into the hill, judging from the conditions on the ground now.
Q. I say when Mr. Collier said that he found at that point the eastern bank of the old channel, would you say that he is mistaken?
A. No, sir.

A. J. PIERCY, another witness for the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wingfield:

Q. What is your profession?
A. Civil engineer.
Q. How long have you been following that profession?
A. About forty-two years.
Q. Have you followed it continuously during all that time?
A. Practically all the time.
[fol. 105] Q. You did a good deal of the location for the Deepwater Railway Company, did you not?
A. Yes, sir.

Q. The Deepwater Railway extended from Deepwater to where?
A. Glen Lynn, or to the Virginian line this side of Glen Lynn.
Q. Then there was the Tidewater Railway extended from what point?
A. From the Virginian line to Tidewater.
Q. They were two entirely separate companies, were they not?
A. Yes, sir.
Q. Have you examined the railroad fill constructed across the creek from Mr. Mullens' property?
A. I made a survey there in February, 1921, for a side track and cross section across the river, showing the banks and over to the foots of the hills all through the town over there of that new addition.
Q. Was the railroad across the creek from Mr. Mullens' property constructed according to approved engineering standard?

(Objected to by counsel for plaintiff; which objection the Court overruled; to which ruling of the Court the plaintiff, by his counsel, at the time excepted.)

A. I should say so.
Q. If you went there and looked at it you would find nothing wrong with it from an engineering standpoint, would you?
A. No, sir.
Q. Would it look like a pretty good railroad?
A. Yes, sir.
Q. Are you familiar with this land that Mr. Mullens own that [fol. 106] has been washed?
A. Yes, sir—the type of the land, you mean?
Q. Yes?
A. Yes, sir.
Q. What is the character of the land?
A. It is sandy and gravel, small boulders.
Q. Is that kind of land bad to wash or not?
A. Yes, sir.
Q. Have you heard the testimony about the flood that occurred in 1919?
A. Yes, sir, I heard the testimony.
Q. In your judgement would that flood have caused the washing of this land whether the railroad had been where it is or not?

(Objected to by counsel for plaintiff; which objection the Court overruled; to which ruling of the Court the plaintiff, by his counsel, at the time excepted.)

A. Well, I would say that class of land would wash most any time it gets over it.
Q. And when it begins to wash does it wash bad?
A. Oh, yes, then it goes right on; it goes right on and keeps raveling off every time it gets up.

Q. Mr. Piercy, I hand you a plat entitled "The Virginian Railway Map", showing Slab Fork channel in the vicinity of A. J. Mullens property. Did you make the curvey for that plat?

A. Yes, sir.

Q. Have you checked it up with your survey?

A. Yes, sir, I made a plat of it and this is a copy of it.

Q. Does it correctly show the result of your survey?

[fol. 107] A. It shows the stream off right correctly.

(The defendant, by counsel, here offered in evidence the plat last above mentioned; to the introduction of which the plaintiff, by counsel, objected; which objection the Court overruled and permitted said plat to be introduced and exhibited to the jury; to which ruling and action of the Court the plaintiff, by his counsel, at the time excepted.)

Q. How was the original bed of the stream ascertained?

(Objected to by counsel for plaintiff; which objection the Court overruled; to which ruling of the Court the plaintiff, by his counsel, at the time excepted.)

A. It was ascertained from the original cross sections and topography of this dotted line here, or usually is, and I suppose that was. That is the meaning of that. This red I know is correct because I measured this thing.

(Counsel for the plaintiff moved to strike the foregoing answer; which motion the Court overruled; to which ruling of the Court the plaintiff, by his counsel, at the time excepted.)

Q. Was this original line of the creek, or original channel of the creek, arrived at from the records of the company on file there in the office?

(Objected to by counsel for plaintiff; which objection the Court overruled; to which ruling of the Court the plaintiff, by his counsel, at the time excepted.)

A. The original part of it was, I suppose. It should have been. They had it on file there ever since the road was constructed, I am sure, which they always do; they have them for reference.

(Counsel for the plaintiff moved to strike the foregoing answer; which motion the Court sustained; to which ruling of the Court the defendant, by counsel, at the time excepted.)

[fol. 108] Cross-examination.

By Mr. Toler:

Q. When you refer to the red lines on this map, Mr. Piercy, by that I beieve you mean the present location?

A. The present creek, the way it is now, or in February, 1921.

Q. That is the date on which you made your measurements?

A. Yes, sir, the last of February, 1921.

Redirect examination.

By Mr. Wingfield:

Q. Mr. Piercy, what could have protected the banks of Mr. Mullens' land after the washing started?

A. Nothing but a wall.

Q. Would it have been neccessary to build one 1,200 feet long?

A. Well, I don't know; I hardly think it would have.

Q. Would it have been necessary to make one four feet thick at the base?

A. No, not if you are going to make a permanent one, I wouldn't think it would.

Q. Would it be necessary to build it of concrete and stone?

A. Well, now, if you built it across that creek there, to make it permanent it would be, but if just a temporary wall wood and stone is good for it probably. If this would go against the side it wouldn't be permanent of course.

Q. If you were building it across the creek it would only be necessary to build a permanent wall for a comparatively short distance?

[fol. 109] A. Yes, sir, where the water would hit it the hardest.

Q. The rest of wood and rock would do as well?

A. Yes, sir, I should think so.

Recross-examination.

By Mr. Toler:

Q. Mr. Piercy, you testified on direct examination a while ago that in your opinion this land would have been washed just as it is washed on account of these high floods whether the railroad was there or not; is that correct?

A. I say if it would get up over it. If it would get over it it would sure wash it.

Q. Assuming, Mr. Piercy, that that was the old channel of the stream between the yellow line and the green one, there along at this point, that at the time the railroad was constructed the entire channel of the stream was filled out here two-thirds of the distance across it, and that all along here in the other portion of the bed of the old stream there was large boulders shot off of the cliff on this side into the bed of the stream, would you or not say that that might augment or accelerate the force of the water and cause it to wash even though it was high water?

A. I would say, if that was the condition, it would be detrimental and probably it would damage it more than if it hadn't been there.

[fol. 110] Redirect examination.

By Mr. Wingfield:

Q. If that condition had existed wouldn't it probably have caused damage before 1904 or 1918?

A. I should say so. From the evidence, this 1919 flood was extremely high and there had never been much damage before, so this must have been an exceptional time.

M. A. Hartigan, Jr., another witness for the defendant being first duly sworn, testified as follows:

Direct examination.

By Mr. Apperson:

Q. What is your position with the Virginian Railway Company?
A. General claim agent.
Q. How long have you been employed by the company?
A. Since 1911, except the two years and two months we were working for the United States Federal Government.
Q. When did the federal control of railroads by the United States Government begin?
A. December 28, 1917.
Q. When did it terminate?
A. Midnight of February 28, 1920.
Q. During the period of federal control did the Virginian Railway Company have anything to do with the operation of the Virginian Railroad?
A. No, the company had nothing in the world to do with the Virginian Railway property.
Q. Who operated it?
[fol. 111] A. The United States Federal Administration — the United States Railroad Administration.
Q. Who paid the operatives of the company?
A. The Railroad Administration, from Washington.
Q. Were any improvements or alterations of the property of the company during federal control allowed to be made by the railway company?
A. No, the railway company executive was suspended or removed from the property and the Federal Railway Administration put a man in charge.
Q. Did the railway company, the corporation, have anything at all to do with the affairs of the company, either the operation, construction or alterations, during that period?
A. No, nothing whatever.
Q. Were they allowed to have anything to do with it?
A. No, sir, they were not.
Q. Did you work for the government during that time?
A. Yes, sir, I did.
Q. Did you have any conversation, or have you ever had any conversation with Mr. Mullens in regard to the character of the freshets of 1918 or 1919 on Slab Fork Creek?
A. Yes, sir.

Q. Will you please state whether he made any statement to you as to the character of those floods, or either of them?

A. He said that the flood in July, 1919, was the greatest flood, the highest in the history of the country, or had ever been, except possibly one in 1861, that he knew nothing about but heard something about, but so far as his experience and observation went the 1919 flood was the highest that they had ever had.

(Counsel for plaintiff moves to strike out the foregoing answer; which motion the Court sustained; to which ruling of the Court the [fol. 112] defendant, by counsel, at the time excepted.)

Cross-examination.

By Mr. Toler:

Q. Mr. Hartigan, if this fill was made here in this stream, as so testified to by the witnesses, and that fill caused the washing of this land down here, the fact that you were working for the Railroad Administration of the United States wouldn't have anything to do with it, would it?

(Objected to by counsel for defendant. No ruling.)

A. No, sir.

Q. And the wash would have occurred just the same whether the United States Government was operating this line of railroad along here or whether Henry Ford or the Virginian Railway Company was operating it?

A. I expect that is right.

It is admitted by counsel that the Deepwater Railway Company was a corporation chartered under the laws of the State of West Virginia and that the Virginian Railway Company was a different corporation chartered under the laws of the State of Virginia.

And thereupon the deposition of A. M. Traugott, taken on behalf of the defendant, was read in evidence to the jury; which deposition is in the words and figures following, to-wit:

(Here insert deposition.)

[fol. 113] IN THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

A. J. MULLENS

v.

THE VIRGINIAN RAILWAY COMPANY

DEPOSITION OF A. M. TRAUGOTT

The deposition of A. M. Traugott, taken before the undersigned, Hamilton H. Chalkley, a notary public for the city of Norfolk, Virginia, at the office of the legal department of the Virginian Railway Company, in the city of Norfolk, Virginia, on the 18th day of August, 1923, at 10 o'clock a. m., pursuant to agreement of the parties and order of the court, to be read as evidence in behalf of the defendant in an action at law pending in the Circuit Court of Wyoming County, West Virginia, wherein A. J. Mullens is the plaintiff and The Virginian Railway Company is the defendant.

Present: For the defendant, Messrs. W. H. T. Loyall, and G. A. Wingfield.

No appearance for the plaintiff.

Phlegar & Tilghman, Shorthand Reporters, Norfolk, Virginia.

[fol. 114] A. M. TRAUGOTT, a witness on behalf of the defendant, being duly sworn, deposes and says as follows:

Examined by Mr. Wingfield:

Q. Please state your name, residence, and occupation?

A. A. M. Traugott; Norfolk, Va.; Assistant Chief Engineer The Virginian Railway Company.

Q. Will you be at Norfolk on the 21st day of August, 1923?

A. I will.

Q. How long have you been employed by the Engineering Department of The Virginian Railway Company and of the Deepwater Railway Company?

A. Since February 10, 1903.

Q. Have you been continuously employed by the Tidewater Railway Company, the Deepwater Railway Company, and the Virginian Railway Company from 1906 to the present time?

A. I have.

Q. Please state when the roadbed along Slab Fork Creek and opposite the lands of A. J. Mullens in Wyoming County, near the town of Mullens, was constructed?

A. The track was laid in March 1906. The roadbed was graded some time prior to that.

Q. What company constructed the roadbed, laid the track, and owned the land on which the roadbed was constructed at that time?

A. Deepwater Railway Company.

[fol. 115] Q. Have you, since the construction of the roadbed at the point mentioned, examined the roadbed?

A. I have.

Q. Was the roadbed constructed in accord with the best standard of engineering practice in vogue at that time?

Obj. Overruled.

A. It was.

Q. In the construction of the roadbed was the flow to be expected down Slab Fork Creek taken into account?

A. It was. The grade was laid above high waters prior to the building of the road.

Q. Was there anything about the construction of the roadbed or location of the roadbed that would indicate to an engineer that the roadbed would constitute a nuisance or divert the waters of Slab Fork that were to be reasonably expected to flow down that stream?

Obj. Sus.

A. There was not.

Q. Please state when the first complaint was made to the Railway Company, so far as your records show from Mr. Mullens on account of the construction of this roadbed?

A. My record shows that complaint was made April 4, 1920.

Q. I hand you a letter signed by A. J. Mullens and addressed to L. R. Taylor, dated April 4, 1920. Is that the first complaint that your records show?

A. It is.

Q. Who was L. R. Taylor?

[fol. 116] A. Superintendent of the New River Division of the Virginian Railway at that time.

Q. Did he forward this letter to you?

A. Yes sir.

Q. I will ask you to file this letter with your deposition as Exhibit 1.

(Note.—The letter is filed herewith marked "Traugott Exhibit 1.)

Q. After the construction of this roadbed, the Deepwater Railway Company conveyed it to the Virginian Railway Company, did it not?

A. It did.

Q. On what date?

A. It was conveyed from the Deepwater Railway Company to the Virginian Railway Company April 22, 1907.

Q. The Deepwater Railway Company and the Virginian Railway Company were entirely separate corporations, were they not?

A. They were.

Q. State what connection there was between the Tidewater Railway Company and the Virginian Railway Company?

A. The name of the Tidewater Railway Company was afterwards changed to the Virginian Railway Company. The Deepwater Railway Company owned and constructed a line from Deepwater, W. Va., to Glenlyn on the Virginia State Line, and the Tidewater Railway [fol. 117] Company owned and constructed a railroad from Glenlyn on the line between Virginia and West Virginia to Sewells Point in Norfolk County, Va.

Q. Did this flood of July 15, 1919 do any damage to the Virginian Railway on this Slab Fork Creek at points other than at opposite the Mullens land?

Obj. Overruled.

A. It did. Part of the railway company's embankments were washed out between Maben and Mullens, and there was a damage of approximately $22,000. It is my understanding that this flood of July 1919 was the highest water known in this vicinity for a considerable number of years.

Q. For how long have you been familiar with the line of the Virginian Railway along this creek and had an opportunity to observe the action of flood waters on the railway company's structures along Slab Fork Creek?

A. Since 1908. I believe it was the highest water since that time.

Q. Were those structures that were washed in the flood of July 1919 constructed above the high waters that had been known before that time?

Obj. Overruled.

A. They were.

Q. Please state whether or not the structure of the railroad company's roadbed that was located opposite the Mullens land as involved in this suit, remained in practically the same condition from the time it was built until the time of the flood of July 15, 1919 which is referred to in this case?

[fol. 118] A. It remained in practically the same condition.

Q. Mr. Traugott, you studied civil engineering at College, did you not?

A. I did.

Q. And since that time you have been continuously engaged in the practice of your profession as civil engineer?

A. I have.

Q. You have risen in your profession from rodman to Assistant Chief Engineer of the Virginian Railway Company, have you not?

A. I have.

Q. Now, during the period of Federal Control, who was the Chief Engineer of the Virginian Railway under the Federal Government?

A. Well, for a part of the time Mr. F. L. Nicholson was Chief Engineer, and on May 1st, 1919, I was appointed Acting Chief Engineer for the Federal Administration.

Q. As Acting Chief Engineer for the Federal Administration, did you have charge of the engineering and maintenance of the tracks of the line of the Virginian Railway?

A. I had charge of the engineering, but not of the maintenance except indirectly.

Q. What was your indirect connection with the maintenance?

A. Directing the policies in maintaining the track.

Q. During the period of Federal Control, were the corporate officers [fol. 119] allowed to have anything to do with the track and roadbeds of the railroad?

A. They were not.

Q. Were they allowed to make any changes or alterations in any of the structures?

A. They were not.

Q. Any changes or alterations in the structures were made by the Federal Government, were they not?

A. They were.

Q. As a matter of fact, during Federal control a great many additions, betterments and alterations were made, were they not?

A. They were.

Q. In West Virginia, in the neighborhood of this Mullens land, there was considerable double tracking done, wasn't there?

A. Not in the immediate vicinity of Mullens. There was double tracking done about ten miles east of Mullens.

Q. During that period the Federal Government also widened some of the tunnels so as to be of sufficient capacity to have double tracks in them, did it not?

A. It did.

Q. And lined those tunnels?

A. Yes, sir.

Q. Did they make any change in any of the fills in West Virginia [fol. 120] during the period of Federal control?

A. They widened the cuts and fills for double track.

Q. All of this work that you have mentioned was executed under the orders of the Federal Government, wasn't it?

A. It was.

Q. And the Chief Engineer of the Virginian Railway had no authority or supervision over the matter, did he?

A. He did not.

Q. During that period, you drew your pay from the Federal Government, did you not?

A. I did.

Q. And all the other employes of the Virginian Railway did, did they not?

A. They did.

Q. Please state whether during the Federal control the authorities of the Virginian Railway Company had anything to do with the operation or management or physical structures of the line of the Virginian Railroad?

Obj. Overruled.

A. The officers of the Virginian Railway Company didn't have anything to do with the railroad or its property during Federal control. The Virginian Railway Company property during Federal control was known as the Virginian Railroad.

Q. Who took entire charge of the operation and physical control of all of the physical property of the Virginian Railway during Federal control?

[fol. 121] A. The United States Railroad Administration.

Q. Please state when Federal control began and ended?

A. It began approximately on January 1st, 1918 and ended on March 1st, 1920.

And further this deponent saith not.

STATE OF VIRGINIA,
City of Norfolk, To wit:

I, Hamilton H. Chalkley, a Notary Public for the City of Norfolk in the State of Virginia do hereby certify that the foregoing deposition of A. M. Traugott was duly taken before me at the time and place and for the purpose mentioned in the caption of the foregoing deposition; that such deposition was taken in shorthand and written out in full and transcribed into the English language by me; and I further certify that such stenographic characters and notes were correctly taken and accurately transcribed by me, and that the witness was duly sworn before said deposition was taken.

Given under my hand and official seal this 18th day of August, 1923.

Hamilton H. Chalkley, Notary Public. (Seal of Hamilton H. Chalkley, Notary Public, Norfolk, Va.)

[fol. 122] EXHIBIT IN EVIDENCE

Mullens, W. Va., April 4, 1920.

Mr. L. R. Taylor, Princeton, W. Va.

DEAR SIR: As you may know, the Vgn. R. R. Co. by crowding the creek over, has caused my property to — washed away, and damaged to the ammount of about twenty-five thousand dollars.

Now I do not ask that the Company pay me damages, but I think it only fair and reasonable that I should ask that the company build a protecting wall along the creek to prevent further loss.

I would like to have you come and look over the proposition with me. I am sure that we can come to some agreement. As my relations with the company has always be-n very agreeable, to the extent that I gave them right of way through my property.

Please let me hear from you.

Very truly yours, A. J. Mullens.

[fol. 123] EXHIBIT IN EVIDENCE

(Copy)

This deed, made this twenty-second day of April, A. D. 1907, between the Deepwater Railway Company, hereinafter called the "Deep-

water Company," a corporation created, organized and existing under the laws of West Virginia, of the first part, and the Virginian Railway Company, hereinafter called the "Virginian Company," a corporation created, organized and existing under the laws of Virginia, of the second part;

Whereas, at a meeting of the stockholders of the Deepwater Company, held at the office of the Company, at Ansted, West Virginia, on the 22nd day of April, 1907, all of the capital stock of the Company which had been issued and was outstanding was represented by the holders thereof, present in person or by proxy, and proceedings were had and a resolution passed and adopted, as shown by an extract from the minutes of said meeting, which is as follows:

"The Chairman stated that the Board of Directors of the Company recommend to the stockholders that they avail themselves of the powers given under the Statutes of West Virginia and sell and convey the property, including the franchises, of the Company, to the Virginian Railway Company (formerly the Tidewater Railway Company), a corporation created, organized and existing under the laws of the State of Virginia, the corporate name of which Company until the 8th day of March, 1907, was the Tidewater Railway Company. He also stated that this Company has located its railway between Deepwater Station, on the Chesapeake and Ohio Railway, in Fayette County, West Virginia, and the line between the States of Virginia and West Virginia on East River in Mercer County, West Virginia, and has constructed and placed in operation a large part thereof, the remainder being all under constructon and approaching completion, and that said line, as located, constructed and under construction, is situate wholly within the State of West Virginia and is connected directly at said State line with the line [fol. 124] of railway located, under construction and partly completed, of said the Virginian Railway Company; and that the line of railroad of the last named Company is situate wholly within the State of Virginia and extends from the point of connection aforesaid to tidewater, near Norfolk, Virginia; and that the said sale and conveyance are recommended in order to make a continuous line of railroad to be run and operated with, or without changes of cars, or break of bulk, or exchange or transfer of passengers or freight, and that the Board of Directors recommend that all the property, rights, privileges and franchises of this Company be sold, transferred, assigned and conveyed to said the Virginian Railway Company, in consideration of the sum of One hundred thousand Dollars ($100,000) and the assumption, by the purchasing Company, of all debts, liabilities, contracts and other obligations of, and all valid claims and demands against this Company. And the Chairman laid before the meeting a draft of a proposed deed from this Company to said the Virginian Railway Company, prepared in accordance with the recommendations of said Board which draft of deed was in the words and figures following, to-wit:"

(Here, upon the record, appeared said draft of deed:)

"Whereupon, after discussion, it was, by the unanimous vote of all the capital stock of this Company, issued and outstanding

Resolved, that the recommendation of the Board of Directors of this Company be and the same is hereby approved and adopted and that the proper officers of this Company be and they are hereby authorized, empowered and directed to cause the deed between this Company and the Virginian Railway Company, a copy whereof has been laid before this meeting, to be executed in the name of this Company and under its corporate seal, and as its act and deed and to be acknowledged for record and upon receipt of the sum of one [fol. 125] hundred thousand dollars ($100,000) to be delivered to the Virginian Railway Company.

And whereas, at a Special Meeting of the stockholders of the Virginian Company, held at the office of the Company at Norfolk, Virginia, on the 15th day of April, 1907, all the capital stock of the Company, issued and outstanding was represented by the holders thereof, present in person or by proxy, and proceedings were had and a resolution passed and adopted as shown by an extract from the minutes of said meeting which is as follows:

"The Chairman stated that the Board of Directors of this Company recommend to the stockholders that they avail themselves of the power given under the Statutes of the States of Virginia and West Virginia, respectively, in such cases made and provided, to acquire and purchase the property, rights and franchises of the Deepwater Railway Company, a corporation created, organized and existing under the laws of West Virginia, the said the Deepwater Railway Company having located a line of railroad between Deepwater Station on the Chesapeake and Ohio Railway, in Fayette County, West Virginia, and a point in Mercer County, West Virginia, on the State line between Virginia and West Virginia, at which last named point it connects with the line of railway located and under construction by this Company, and the said the Deepwater Railway Company having under construction all of its said line, and the larger part thereof completed and the remainder rapidly approaching completion; the said purchase being recommended in order to make a continuous line of railroad to be run and operated, with or without changes of cars, or break of bulk, or exchange or transfer of passengers or freight; and the Chairman laid before the meeting a draft of a proposed deed from said the Deepwater Railway Company to this Company, conveying all its property, rights, privileges and franchises to this Company, in consideration of One hundred thou- [fol. 126] sand dollars ($100,000) cash and the assumption by this Company of all the liabilities, contracts and other obligations of, and all valid claims and demands against, said the Deepwater Railway Company which draft of deed was in the words and figures following, to-wit:"

(Here upon the record appeared said draft of deed.)

"Whereupon, after discussion, it was, on motion, by the unanimous vote of all the stock issued and outstanding of this Company,

Resolved, that the recommendation of the Board of Directors of this Company be and the same is hereby approved and adopted, and that the proper officers of this Company be and they are hereby authorized, empowered and directed to cause the said deed between said the Deepwater Railway Company and this Company, a draft of which has been laid before this meeting, to be executed in the name of this Company and under its corporate seal and as its act and deed, and to be acknowledged for record, and to cause said deed when executed and acknowledged by the proper officers in behalf of the Deepwater Railway Company and delivered, to be recorded, and to pay to the proper person or persons, on behalf of the Deepwater Railway Company, the sum of One hundred thousand ($100,000) dollars, the cash consideration for said deed.

And, whereas, the stockholders and Boards of Directors of each of the Companies hereto have determined that the interests of both Companies and the convenience of the public will be promoted by the acquisition, by the Virginian Company, of all the property, rights, franchises and privileges of the Deepwater Company, and the Board of Directors of each of the parties hereto, respectively, have authorized and directed the execution of this deed, on behalf of the parties hereto, respectively;

And whereas, this deed is a true copy of the draft referred to in the minutes and resolutions aforesaid of the said meetings of the [fol. 127] respective stockholders of the two Companies, parties hereto;

And whereas, the notice in respect to the proposed sale required by Section 53 of Chapter 54 of the Code of West Virginia has been duly given and published;

Now, therefore, this deed witnesseth: that the Deepwater Company, for and in consideration of the premises and of One hundred thousand Dollars ($100,000), cash in hand paid, the receipt whereof is hereby acknowledged, and of the covenants and agreements on the part of the Virginian Company, hereinafter set out, has granted, bargained, sold, aliened, remised, released and conveyed, and by these presents, does grant, bargain, sell, alien, remise, release and convey unto the Virginian Company, its successors and assigns, all the line of railway extending from Deepwater, in Fayette County, West Virginia, to the line between the States of Virginia and West Virginia on East River in Mercer County, West Virginia, together with all extensions, branches, side-tracks, franchises, rights, privileges, lands, tenements, hereditaments, and property of every description, real, personal and mixed, thereunto belonging or appertaining, or belonging or appertaining to said extensions, branches and side-tracks, including buildings, station houses, warehouses and structures of every kind and description, and including and intending to include, in these presents, the roadbed, superstructure and right of way, rails, track, side-tracks, bridges, viaducts, car houses, engine

houses, freight houses, wood houses, warehouses, machine shops and other shops, turn tables, stations, fences, structures, fixtures and appurtenances and all other things of whatever kind thereunto belonging, or in anywise appertaining to such line of railway and extensions and branches, which have been, or may be, at any time, acquired or provided for use upon or in connection with the said [fol. 128] line of railway and extensions and branches, which have been, or may be, at any time, acquired or provided for use upon or in connection with the said line of railway and extensions and branches; and all lines, now acquired, or which may hereafter be acquired, warehouses and other structures at any terminal or along the said lines of railway or extensions or branches; and also all the locomotives, engines, cars and other rolling stock, equipment, machinery, instruments, tools, implements, materials, furniture, and other chattels now belonging or appertaining to said railway and extensions and branches above described; and all leaseholds, leases, rights under leases or under contracts, covenants and agreements, terms, or parts of terms, now held or hereafter acquired, choses in action and debts due the Deepwater Company, property real, personal and mixed, of every kind and description of the Deepwater Company, now owned or which hereafter may be acquired, for use upon or in connection with its line of railway and extensions and branches above described; and also all the corporate rights, privileges and franchises of every kind and description which the Deepwater Company can exercise in, to or upon or in respect to its lines of railway, extensions, branches or any part thereof, necessary for the construction, maintenance or operation of its line of railway, extensions and branches thereof, or which may hereafter belong or pertain to the same, or any part thereof; and also all the rents, issues and profits, tolls and other income of the said line of railway and extensions and branches, and all the rights, privileges and franchises, property, real, personal and mixed, and rights and things which the Deepwater Company may own or which it in anywise possesses, or may become entitled to for the purpose of, or in connection with, its said line of railway, extensions and branches, as herein conveyed, or intended to be conveyed, or in the operation, use and main- [fol. 129] tenance thereof;

To have and to hold the said railway, extensions, branches, properties, rights, privileges and franchises to the Virginian Company, to and for the only proper use and behoof of the Virginian Company, its successors and assigns; with the right to the Virginian Company to prosecute at its own proper cost and charges, but in the name of the Deepwater Company, any proceeding, suit, action or other litigation which the Deepwater Company may have heretofore instituted and which may be pending at the date of the delivery of this deed; and to institute and prosecute, in its own name, or in the name of the Deepwater Company, as it may elect or be advised, but in either case, at its own proper cost and charges, any action, suit or proceeding which it may deem or be advised is necessary, proper or expedient, for the recovery of any debt conveyed, assigned or transferred to it by this deed, or otherwise, by the Deepwater

Company, or for the assertion of any right, privilege, franchise, or power conveyed, assigned or transferred to it by this deed or otherwise by the Deepwater Company;

Subject, however, to the assumption, by the Virginian Company, of all the lawful debts, liablities, contracts and other obligations of the Deepwater Company, with the right, however, to the Virginian Company to make any and all defenses in law or in equity which the Deepwater Company would have had the right to make in any case; and the Virginian Company covenants and agrees that it will, and it does hereby assume all the lawful debts, liabilities, contracts and other obligations of the Deepwater Company subject to its right to make any and all defenses in law or in equity which the Deepwater Company would have had the right to make in any case.

In witness whereof, The Deepwater Railway Company has hereunto caused its corporate name to be signed and its corporate seal [fol. 130] to be affixed by its President thereunto duly authorized; and The Virginian Railway Company has hereunto caused its corporate name to be signed and its corporate seal to be affixed by its President thereunto duly authorized; three (3) other originals being executed in the same manner and at the same time.

The Deepwater Railway Company, by J. O. Green, President. (Seal.) The Virginian Railway Company, by Wm. N. Page, President. (Seal.)

STATE OF WEST VIRGINIA,
County of Fayette, To wit:

I, Joseph M. Tyree, a Notary of the said County of Fayette, do certify that J. O. Green, personally appeared before me in my said county, and, being by me duly sworn, did depose and say that he is the President of The Deepwater Railway Company, one of the corporations described in the writing hereto annexed, bearing date the twenty-second day of April, 1907, authorized by said corporation to execute and acknowledge deeds and other writings of said corporation, and that the seal affixed to said writing is the corporate seal of said corporation, and that said writing was signed and sealed by him in behalf of said corporation, by its authority duly given. And the said J. O. Green acknowledged the said writing to be the act and deed of said corporation.

Given under my hand and official seal this 22nd day of April, 1907.

Joseph M. Tyree, Notary Public. (Seal.)

STATE OF WEST VIRGINIA,
County of Fayette, To-wit:

I, Joseph M. Tyree, a Notary of the said County of Fayette, do certify that William N. Page personally appeared before me in my said county, and being by me duly sworn, did depose and say [fol. 131] that he is the President of The Virginian Railway Company, one of the corporations described in the writing hereto annexed, bearing date the twenty-second day of April, 1907, authorized

by said corporation to execute and acknowledge deed and other writings of said corporation, and that the seal affixed to said writing is the corporate seal of said corporation, and that said writing was signed and sealed by him in behalf of said corporation, by its authority duly given. And the said William N. Page acknowledged the said writing to be the act and deed of said corporation.

Given under my hand and official seal this 22nd day of April, 1907.

Joseph M. Tyree, Notary Public. (Seal.)

[fol. 132] EXHIBIT IN EVIDENCE

(Copy)

This Deed made this 20th day of July, 1904, between A. J. Mullins and Harriet Mullins, his wife, of the County of Wyoming, and State of West Virginia, parties of the first part, and the Deepwater Railway Company, a West Virginia corporation, party of the second part,

Witnesseth: That for and in consideration of the sum of One Dollar ($1.00) cash in hand paid to the parties of the first part, the receipt of which is hereby acknowledged, and for the further and additional consideration as hereinafter set forth, the said parties of the first part do hereby grant and convey unto the said The Deepwater Railway Company, party of the second part, as aforesaid, the following described strip, piece or parcel of land lying and being in the County of Wyoming and State of West Virginia and situate on the waters of Slab Fork, together with such additional land on either side of the strip hereinafter described, as may be necessary for the slopes of cuts and fills and for changing the channels of streams, such extra widths to be taken and used so as not to unnecessarily damage the residue of the lands of the parties of the first part; the strip hereby conveyed as aforesaid, is described as follows: A strip of land sixty-six (66) feet wide, that is to say thirty-three (33) feet on each side of the center line of the Deepwater Railway as revised, located and staked; being all the lands of the parties of the first part that may lie within a strip sixty-six (66) feet wide and included between two lines, one on each side of said center line of said railway and parallel to and distant thirty-three (33) feet therefrom, said center line, parallel lines and the strip included extending entirely through and across the lands of said parties of the first part; which said center line of the Deepwater Railway through this property is described as follows: Beginning at station 887+36 P. C. C.—887+36 of the original location; thence on a 1° curve [fol. 133] to the left 1163 feet to station 898+99 on the boundary line between the lands of the parties of the first part and those of the Pocahontas Coal & Coke Company; said strip or parcel of land containing one and seventy-six hundredths (1 76/100) acres, more or less.

And as an additional consideration moving this conveyance, and in consideration of the above conveyance, the said The Deepwater Railway Company hereby grants and conveys unto the said A. J.

Mullins, party of the first part, as aforesaid, the following described piece of parcel of land lying and being in the County and State aforesaid, on the waters of Slab Fork, and described as follows: A strip of land sixty-six (66) feet in width and included in between two parallel lines, one on each side of the original center line of the Deepwater Railway and distant thirty-three (33) feet therefrom, which said center line through this strip is described as follows: Beginning at station 887+36; thence on a 6° and 42′ curve to the left 230.2 feet to station 889+66.2 P. T.; thence on a tangent N. 59° 45′ W. 748.8 feet to station 897+15 P. C.; thence on a 12° curve to the right 348 feet to station 900+63 on the line between the lands of said parties of the first part and those of the Pocahontas Coal & Coke Company: Said strip or parcel of land containing two and one hundredths (2 1/100) acres, more or less, and being a portion of the right of way of the Deepwater Railway Company on the original location through the lands of said A. J. Mullins which was conveyed to said company by deed dated the 10th day of October, 1902.

The said A. J. Mullins and Harriet Mullins, his wife, hereby covenant that they will warrant generally the property hereby and herein conveyed by them to the said The Deepwater Railway Company; and the said The Deepwater Railway Company covenants to warrant specially the property hereby and herein conveyed by it to the said A. J. Mullins.

[fol.134] Witness the following signatures and seals:

A. J. Mullins. (Seal.) Harriet (her x mark) Mullins. (Seal.) The Deepwater Railway Company, by Wm. N. Page, Chief Engineer. (Seal Deepwater Railway Company, West Virginia., Inc. 1898, Jany. 25.)

Witness: John Kee. (Seal.)

STATE OF WEST VIRGINIA,
County of Wyoming, To wit:

I, N. G. Lambert, a Notary Public of the said County of Wyoming do certify that A. J. Mullins and Harriet Mullins, his wife, whose names are signed to the writing above bearing date on the 20th day of July, 1904, have this day acknowledged the same before me in my said County.

Given under my hand this 22 day of July, 1904.

N. G. Lambert, N. P.

STATE OF WEST VIRGINIA,
County of Fayette, To-wit:

I, Joseph M. Tyree, a Notary Public of the said County of Fayette, do certify that W. N. Page personally appeared before me in my said County, and being by me duly sworn did depose and say that he is the Chief Engineer of the corporation described in the writing above, bearing date the 20th day of July, 1904, authorized by said corporation to execute and acknowledge deeds and other writings of said corporation, and that the seal affixed to the said writing is the corporate seal of said corporation, and that said writing was signed and sealed by him in behalf of said corporation by its authority

duly given. And the said W. N. Page acknowledged the said writing to be the act and deed of said corporation.

Given under my hand this 22d day of July 1904.

Joseph M. Tyree, Notary Public

[fol. 135] Office of the Clerk of the County Court, ss:

Wyoming County, W. Va., Aug. 30, 1904.

The foregoing deed from A. J. Mullins and wife to The Deepwater Railway Co., together with the certificate of acknowledgment thereof, thereto annexed, was this day admitted to record in said office.

Teste: A. M. Stewart, Clerk.

[fol. 136] Exhibit in Evidence

This deed, made this 10th day of October, 1902, between A. J. Mullins and Harriet Mullins, his wife, of the County of Wyoming and State of West Virginia, parties of the first part, and The Deepwater Railway Company, a West Virginia corporation, party of the second part;

Witnesseth:

That, for and in consideration of the sum of One Dollar to the parties of the first part in hand paid, the receipt whereof is hereby acknowledged, and of the stipulation and agreement hereinafter contained, the said parties of the first part do hereby grant and convey unto the said The Deepwater Railway Company, party of the second part as aforesaid, the two following described strips, pieces, or parcels of land, lying and being in the district of Slab Fork, County of Wyoming, and State of West Virginia, on the waters of Slab Fork and Guyandotte River, being portions of that track of land conveyed to first parties by William R. Belcher and on which said first parties now reside, and the first of which said strips is described as follows: A strip of land 66 feet wide, that is to say, 33 feet on each side of the center line of The Deepwater Railway as now located and staked across and through the lands of said parties of the first part, from where said center line crosses the line between the lands of said first parties and lands of M. J. Simpson et als to where said center line crosses the line between said first parties' lands and lands owned by the Pocahontas Coal & Coke Company, which said center line of The Deepwater Railway is described as follows: Beginning at station 843+20 on the said center line on the line between the parties of the first part and lands of the said M. J. Simpson et als.; thence on a 6° curve to the left to station 847+99.4 P. T.; thence on a tangent North 0° 30′ East to station 853+29.7 P. C.; thence on a 12° curve to the right to station 855–40 on the line between lands of grantors and lands of the Pocahontas Coal & Coke Company; said [fol. 137] strip containing by estimation 1.84 acres, be the same more or less.

The second strip is described as follows: A strip of land 66 feet wide, that is to say 33 feet on each side of the center line of The

Deepwater Railway as now located and staked across the lands of said parties of the first part from where said center line crosses the line between lands of first parties and lands of the Pocahontas Coal & Coke Company on the Southerly boundary of said first parties lands to where said center line crosses another line between said first parties and the said Pocahontas Coal & Coke Company, which said center line of The Deepwater Railway is described as follows: Beginning at station 883+95 on the said center line as now located and staked on the line between the lands of the parties of the first part and The Pocahontas Coal & Coke Company; thence on a 6° 42′ curve to the left to station 889+66.2 P. T.; thence on a tangent N. 50° 45′ West to station 897+15 P. C.; thence on a 12° curve to the right to station 900+15 on the line between grantors and the Pocahontas Coal & Coke Company; said strip containing by estimation 2.46 acres, be the same more or less.

Each of the strips hereby sold and conveyed being, as hereinbefore set forth, 66 feet wide, 33 feet on each side of, and extending with the above described center lines. It is understood that the strips of land herein conveyed are for use as a right-of-way for a railway second party contemplates building over and through the said lands, and in the event said railway should be constructed, the said, The Deepwater Railway Company hereby agrees to locate and establish a station or depot on their said line of railway at some point along the strip first herein mentioned and conveyed; and should the erection of such depot or station require additional land outside of said strip, second party may take same under this conveyance but only such additional as may be necessary for the proper erection and maintenance of such depot or station buildings and platforms. The parties of the first part covenant to warrant generally the property hereby [fol. 138] conveyed.

The parties of the first part shall have the right, at any time before the construction of the said railway is commenced, to remove from both of the strips hereby conveyed any timber, merchantable or otherwise, which may now be thereon.

Witness the following signatures and seals.

A. J. Mullins. (Seal.) Harriet (her x mark) Mullins. (Seal.)

Witness-: John Kee, Ellet Woofter.

STATE OF WEST VIRGINIA,
County of Wyoming, To wit:

I, Isaac Lambert, a Notary Public of the said County of Wyoming, do certify that A. J. Mullins and Harriet Mullins, his wife, whose names are signed to the above writing, bearing date the 10th day of October, 1902, have this day acknowledged the same before me in my said County.

Given under my hand this 11th day of October, 1902.

Isaac Lambert, Notary Public

Deepwater Railway as now located and staked across the lands of said parties of the first part from where said center line crosses the line between lands of first parties and lands of the Pocahontas Coal & Coke Company on the Southerly boundary of said first parties lands to where said center line crosses another line between said first parties and the said Pocahontas Coal & Coke Company, which said center line of The Deepwater Railway is described as follows: Beginning at station 883+95 on the said center line as now located and staked on the line between the lands of the parties of the first part and The Pocahontas Coal & Coke Company; thence on a 6° 42′ curve to the left to station 889+66.2 P. T.; thence on a tangent N. 50° 45′ West to station 897+15 P. C.; thence on a 12° curve to the right to station 900+15 on the line between grantors and the Pocahontas Coal & Coke Company; said strip containing by estimation 2.46 acres, be the same more or less.

Each of the strips hereby sold and conveyed being, as hereinbefore set forth, 66 feet wide, 33 feet on each side of, and extending with the above described center lines. It is understood that the strips of land herein conveyed are for use as a right-of-way for a railway second party contemplates building over and through the said lands, and in the event said railway should be constructed, the said, The Deepwater Railway Company hereby agrees to locate and establish a station or depot on their said line of railway at some point along the strip first herein mentioned and conveyed; and should the erection of such depot or station require additional land outside of said strip, second party may take same under this conveyance but only such additional as may be necessary for the proper erection and maintenance of such depot or station buildings and platforms. The parties of the first part covenant to warrant generally the property hereby [fol. 138] conveyed.

The parties of the first part shall have the right, at any time before the construction of the said railway is commenced, to remove from both of the strips hereby conveyed any timber, merchantable or otherwise, which may now be thereon.

Witness the following signatures and seals.

A. J. Mullins. (Seal.) Harriet (x) Mullins. (Seal.)
her mark

Witness-: John Kee, Ellet Woofter.

STATE OF WEST VIRGINIA,
County of Wyoming, To wit:

I, Isaac Lambert, a Notary Public of the said County of Wyoming, do certify that A. J. Mullins and Harriet Mullins, his wife, whose names are signed to the above writing, bearing date the 10th day of October, 1902, have this day acknowledged the same before me in my said County.

Given under my hand this 11th day of October, 1902.

Isaac Lambert, Notary Public

Office of the Clerk of the County Court

Wyoming County, W. Va., October 15, 1902.

The foregoing writing together with the certificate of acknowledgment thereof thereto annexed was this day admitted to record in said office.

Teste: C. F. Stewart, Clerk, per A. M. Stewart, Deputy.

Recorded in Deed Book No. 27, p. 68, et seq.

C. F. Stewart, Clerk.

(Here follow exhibits in evidence marked side folio pages 139 and 140.)

[fol. 141] And the court hereby certifies that the foregoing is the evidence and all of the evidence introduced by both the plaintiff and the defendant upon the trial of the above mentioned case, and thereupon the plaintiff by counsel tendered to the court and requested the court to give to the jury seven certain instructions in writing, to the giving of which and each of which the defendant by counsel objected, but the court overruled said objection and gave said instructions and each of them to the jury. To which action and ruling of the court the defendant by counsel at the time excepted. The said instructions so given to the jury on behalf of the plaintiff are in the words and figures following, to-wit:

PLAINTIFF'S REQUESTED INSTRUCTIONS TO JURY

Plaintiff's Instruction #1

The court instructs the jury that the owner of land, through or by which a natural stream of water flows in a natural channel, has a right to have the water of said stream to continue to flow through or by his land in its natural state and condition as it is wont to flow, and any person who wrongfully obstructs, diverts or changes the channel of such stream or the natural flow of the water therein, to the injury of such owner, is liable to such owner for such damages as may be sustained by such owner by reason thereof; and if you believe from the evidence in this case that the defendant, in grading and constructing its railroad, unlawfully cast into and filled up the channel of Slab Fork Creek with stone, dirt, timber or other debris, on the bank thereof opposite plaintiff's land, and thereby obstructed the channel of said stream and diverted the water thereof from its said natural channel and caused the same to flow over and upon plaintiff's [fol. 142] land, and to wash away and destroy plaintiff's land and fencing thereon, and the fruit trees, grass and other crops growing thereon, then the plaintiff is entitled to recover from the defendant such amount as you may believe from the evidence is necessary to

compensate him for the injuries thereby sustained by him for and during the period of five years next and preceding the institution of this suit, but the plaintiff is not entitled to recover in this action any amount for any such damages as he may have sustained more than five years prior to the date of the institution of this suit nor for any damage that he may have sustained since the institution of this suit.

Plaintiff's Instruction #2

The court further instructs the jury that in determining and arriving at the amount of damages to which the plaintiff is entitled, if any, you should take into consideration the deterioration in the value of the plaintiff's land, caused by such washing away of the same, during the period of five years next preceding the institution of this suit, the damages suffered by the plaintiff during that period on account of injury to and destruction of grass and other crops and the destruction of fruit trees and fencing and all money properly paid out and expended by the plaintiff in an effort to protect his land, fencing, soil, fruit trees, grass and other crops against such injury and destruction.

Plaintiff's Instruction #3

The court instructs the jury that the fact that the defendant had legally acquired that portion of the bed and channel of said stream into which it cast the dirt, stone, timber and other debris and owned the same as a part of its right of way for the construction of its said [fol. 143] railroad, and was not guilty of any negligence in the construction of its said railroad and did the same in the most approved manner, constitutes no defense of this action.

Plaintiff's Instruction #4

The court instructs the jury that if the floods, or any of them, which washed away and destroyed the plaintiff's land, fruit trees, fences grass or other crops, were extraordinarily high and were the result of unusual and unprecedented rains, and that such washing away and destroying of plaintiff's land, fruit trees, grass and other crops was due entirely and solely to such extraordinary flood or floods, and not in any way to the obstruction and diversion of said stream by the defendant, the plaintiff is not entitled to recover; but if you shall believe from the evidence in the case that the acts of the defendant in obstructing the channel of said stream and diverting the flow of the water therein augmented or accelerated the forces of such extraordinary flood or floods and thereby cooperated with such extraordinary flood or floods and contributed to the injury of plaintiff's land, fruit trees, fences, grass and other crops, then the fact that such flood or floods was extraordinarily high and resulted from unusual and unprecedented rains constitutes no defense to the plaintiff's action:

Plaintiff's Instruction #5

The court further instructs the jury that if the defendant relies upon the fact that the floods, or any of them, which injured the plaintiff were extraordinarily high and the result of unusual and unprecedented rains as a defense to this action, then the burden is on the defendant to establish such defense by showing to the [fol. 144] satisfaction of the jury that the injuries sustained by the plaintiff were due solely and entirely to the extraordinary height of such flood or floods and not due in any way to or caused by the obstruction placed in said stream by the defendant.

Plaintiff's Instruction #6

The court instructs the jury that if they believe from the evidence that the damage and injury complained of was due to and caused by the obstructions placed in said stream as alleged in the declaration in this case and as testified to by witnesses for the plaintiff, and was not in any way due to or caused by the operation of said railroad system by the United States Railroad Administration, then the fact that said railroad was operated and controlled by said railroad administration at the time the injuries or any of them occurred constitutes no defense to this action.

Plaintiff's Instruction #7

The court instructs the jury that if you believe from the evidence in this case that the defendant wrongfully obstructed said stream and diverted the waters thereof as charged in the declaration and testified to by the witnesses, and that such obstruction and diversion resulted in the injuries complained of, then the plaintiff was not required to build a wall or widen the channel of said stream for the protection of his land or property, and the fact that he did not do so constitutes no defense to this action.

And thereupon the defendant tendered to the court and requested the court to give to the jury Instruction #A in the words and figures following, to-wit:

"The court instructs the jury that the evidence is not sufficient [fol. 145] to sustain a verdict for the plaintiff and they must, therefore, find for the defendant."

But the court refused to give said Instruction #A, to which action and ruling of the court the defendant by counsel at the time excepted.

And thereupon the defendant by counsel tendered to the court and requested the court to give certain instructions in writing, to the giving of each of which the plaintiff by counsel objected, but the court overruled said objection as to Instructions Nos. 1, 2 and 3 and gave the same to the jury, to which action and ruling of the

court the plaintiff by counsel excepted. Said Instructions Nos. 1, 2 and 3 so given to the jury in behalf of the defendant are in the words and figures following, to-wit:

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY

Defendant's Instruction #1

The court instructs the jury that the burden of proof is on the plaintiff to show by a preponderance of affirmative evidence every fact necessary for a recovery by him. The burden of proof is on the plaintiff to show by such preponderance of the evidence not only the facts relied on to impose a liability on the defendant, but also the amount of the damages alleged to have been suffered by the plaintiff.

Defendant's Instruction #2

The court instructs the jury that in considering whether or not the Deepwater Railway Company improperly constructed its road bed, they are entitled to take into consideration whether there was any appreciable damage to the plaintiff's land due to the diversion of the waters of Slab Fork Creek between the time of the original construction of the road bed in 1906, or prior thereto, and the flood of 1918.

[fol. 146] Defendant's Instruction #3

The court instructs the jury that they must find for the defendant on that count of the declaration charging that on July 17th, 1919, the defendant entered on the land of the plaintiff and dug up and hauled away a quantity of earth, stone, soil, etc., and that the defendant is not liable for such acts.

But as to Instructions Nos. 4 to 13 inclusive so offered by the defendant the court sustained the objection of the plaintiff, to the giving of the same and declined and refused to give the same, or either or any of them to the jury, to which action and ruling of the court the defendant by counsel at the time excepted. Said Instructions Nos. 4 to 13 inclusive so offered by the defendant and refused by the court are in the words and figures following, to-wit:

Defendant's Instruction #4

The court instructs the jury that there is no liability on the defendant for any damages caused by floods occurring between December 28th, 1917, and March 1st, 1920, and they must find for the defendant for damages caused by floods occurring between these dates.

Defendant's Instruction #5

The court instructs the jury that under the evidence in this case there can be no recovery for damages caused by rocks and other

debris placed in the stream opposite plantiff's land, outside of the embankment of defendant, by the contractor who built defendant's road bed.

Defendant's Instruction #6

The court instructs the jury that the only duty resting upon the Deepwater Railway Company was to construct its embankment and [fol. 147] fill in such a proper and skillful manner as not to injure or damage the property of the plaintiff under such freshets as were to be reasonably anticipated, and the court instructs the jury that the defendant was within its rights in constructing such fill or embankment on its property along Slab Fork Creek, provided such embankment or fill would not, under conditions reasonably to be anticipated, cause the waters of Slab Fork Creek to injure the lands of the plaintiff.

Defendant's Instruction #7

The court instructs the jury that if they believe from the evidence that the Deepwater Railway Company, on or about the year 1904, in constructing its railroad bed, cast into and filled up the channel of the stream adjacent or near to the plaintiff's property, with stone, earth or any other material or substance so as to divert the waters of the stream and to cause the waters of the stream to overflow the land of the plaintiff in times of high water and wash away and destroy plaintiff's property on said land and to injure plaintiff's land, and if they further believe from the evidence that the said Deepwater Railway Company by deed dated the 22nd day of April, 1907, conveyed said road bed to the defendant, the defendant is not liable for the damages caused by the said acts of the Deepwater Railway Company and they shall find for the defendant as to any such damages, whether they occurred before or after the deed of April 22nd, 1907, above referred to.

Defendant's Instruction #8

The court instructs the jury that if they believe from tthe evidence that the damage to the plaintiff's land and property was caused by rocks, earth and other material deposited in or near the stream adjacent to or near to plaintiff's land by the Deepwater Railway Company in or about 1904, as alleged in the declaration, that said [fol. 148] road bed was constructed in accordance with the usual standards of engineering practice in use at the time, and that after the said obstructions were so placed in or near the stream by the said Deepwater Railway Company, said Deepwater Railway Company conveyed said road bed to the defendant, The Virginian Railway Company, and that the plaintiff made no complaint or objection to The Virginian Railway Company to said fill or obstructions prior to the flood of July 1919, the plaintiff cannot recover and they must find for the defendant.

Defendant's Instruction #9

The court instructs the jury that if they believe from the evidence that the damage to the plaintiff's land and property was caused by rocks, earth and other material deposited in or near the stream adjacent or near to plaintiff's land by the Deepwater Railway Company in or about 1904 as alleged in the declaration, and that after the said obstructions were so placed in or near the stream by the said Deepwater Railway Company, said Deepwater Railway Company conveyed said road bed to the defendant, The Virginian Railway Company, and that the plaintiff made no complaint or objection to said fill or obstructions prior to the flood of July 1919, the plaintiff cannot recover and they must find for the defendant.

Defendant's Instruction #10

The court instructs the jury that if they believe from the evidence that the plaintiff executed and delivered to the Deepwater Railway Company the deed of July 20th, 1904, and that the Deepwater Railway Company accepted said deed and acting thereunder built its road bed on the land conveyed thereby and diverted the course of the stream by erecting a part of its road bed partly in the stream, and that the plaintiff knew, or had a reasonable opportunity to know, the location of the road bed as actually erected and built, [fol. 149] and that thereafter in the year 1907 the Deepwater Railway Company conveyed said road bed to the defendant and the defendant took possession of said road bed, neither the Deepwater Railway Company nor the defendant were liable, after said embankment was constructed, to observe the action of the water or to protect the banks of the stream or to take other measures to prevent the encroachment of the stream on other neighboring land of the plaintiff, and they must therefore find for the defendant.

Defendant's Instruction #11

The court instructs the jury that if they shall believe from the evidence that the plaintiff conveyed to the Deepwater Railway Company for railway purposes the land which the plaintiff claims in this suit was changed in such manner as to divert the waters of Slab Fork and cast them upon his land; yet if they shall further believe from the evidence that the road bed and track of the defendant was built on such land in a manner which was in accordance with the approved standard of railroad construction, then although such construction might have diverted the waters of Slab Fork on to plaintiff's land, the defendant is not liable therefor.

Defendant's Instruction #12

The court instructs the jury that under the deed from the Deepwater Railway Company to the Virginian Railway Company of April 22nd, 1907, The Virginian Railway Company did not assume

any liability for, and is not liable for, the manner in which the road bed of the defendant was constructed, even if the jury believe from the evidence that such road bed was constructed by the Deepwater Railway Company so that the waters of Slab Fork Creek were diverted upon the plaintiff's land.

[fol. 150] Defendant's Instruction #13

The court instructs the jury that the defendant is not charged with the duty of anticipating an unusual or extraordinary flood or the results that might possibly follow therefrom and if they find from the evidence that the flood and consequent rise of water in Slab Fork Creek was the highest within the memory of any of the witnesses testifying, such flood and rise of water was so unusual and extraordinary that there was no obligation on the defendant to guard against its results, and the plaintiff cannot recover in this action if they further believe from the evidence that the defendant's embankment was such as would not cause the waters of Slab Fork Creek to damage the lands of the plaintiff in times of such ordinary high waters as might reasonably have been expected to flow down said creek.

And thereupon, after receiving the instructions of the court and hearing the arguments of counsel, the jury retired to their room to consider of their verdict and after some time returned to the court with a verdict in the words and figures following, to-wit:

"We, the jury, upon the issues joined between the plaintiff and defendant find for the plaintiff and assess his damages at the sum of $8,000.00.

T. W. Buchanan, Foreman."

And the jury was discharged in this cause and thereupon the defendant moved the court to set aside the verdict of the jury, because the court improperly received evidence offered by the plaintiff over the objection of the defendant, because of errors in instructions given for the plaintiff, because of refusing proper instructions offered by the defendant, because the verdict was contrary to the law and evidence, [fol. 151] and because the court improperly excluded competent evidence offered by the defendant. And the court not being advised of its decision upon said motion, took the same under advisement and at a later date, the court being advised of its decision upon said motion, overruled the same and entered judgment in favor of the plaintiff against the defendant in accordance with the said verdict.

And the defendant thereupon tenders this, its Bill of Exceptions #1, and prays that the same may be signed, sealed and saved to it and made a part of the record in this cause, which is accordingly done, said Bill of Exceptions being marked for the purpose of identification "Bill of Exceptions No. 1."

R. D. Bailey, Judge.

[fol. 152] In Circuit Court of Wyoming County

Clerk's Certificate

I, Geo. M. Farley, Clerk of the Circuit Court of said County, do certify that the foregoing petition, together with the certificate of M. P. Howard, thereto attached, was this day filed in my office in duplicate.

I further certify that a bond in the penalty of Five Hundred Dollars ($500.00), with security approved by me as sufficient, and conditioned to secure the payment of the expense of the preparation and indexing of the recording fees, for filing said petition and making and certifying necessary orders, costs of transmission and returning of the record, and making of the transcript of the record in the above styled cause, has been executed and filed in my said office.

Given under my hand and the seal of the Court, this the 1st day of February, 1924.

Geo. M. Farley, Clerk. (Seal of Circuit Court, Wyoming County, West Virginia.)

(4170)

Supreme Court of the United States

On Petition for Writ of Certiorari to the Circuit Court of Wyoming County, State of West Virginia

Order Granting Petition for Certiorari—Filed Dec. 15, 1924
1924

On consideration of the petition for a writ of certiorari herein to the Circuit Court of Wyoming County, State of West Virginia, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

(5917)

AUG
WM. R.

Supreme Court of the United States

OCTOBER TERM, [redacted] 1925.

No. 6[redacted] 163

THE VIRGINIAN RAILWAY COMPANY, *Petitioner*

vs.

A. J. MULLENS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI AND BRIEF OF COUNSEL FOR PETITIONER.

ROANOKE PRINTING CO., INC., ROANOKE, VA.

Supreme Court of the United States

OCTOBER TERM, 1924

No._____

THE VIRGINIAN RAILWAY COMPANY, a Corporation,
Petitioner

vs.

A. J. MULLENS, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

The petition of the Virginian Railway Company, a corporation, respectfully shows to this Honorable Court:

(1) That by deeds dated in the years 1902 and 1904, respondent conveyed to the Deepwater Railway Company, a West Virginia corporation, the predecessor in title of your Petitioner, two strips of land situated in Wyoming County, West Virginia, for a right-of-way for a railroad to be constructed thereon by the said Deepwater Railway Company, and that prior to the year 1906, the said Deepwater Railway Company constructed its roadbed upon said strips of land, and shortly thereafter commenced the operation of a railroad thereover.

(2) That by deed dated the 22nd day of April, 1907, the Deepwater Railway Company conveyed said strips of land together with the railroad constructed thereon to your Petitioner, a Virginia corporation.

(3) That from the date of the said deed in 1907, until the beginning of Federal control on December 26th, 1917, your Petitioner continuously operated its line of railroad over the said strip of land and adjacent to the lands of Respondent without any notice or knowledge, whatsoever, that Respondent claimed that Petitioner's embankments diverted the water upon Respondent's land or in any manner constituted a nuisance.

(4) That on December the 26th, 1917, the United States through the Director General of Railroads took complete possession of the physical properties of your Petitioner, including so much of its roadbed as lay adjacent to Respondent's land, and took over the operation of Petitioner's line of railroad so completely that Petitioner was completely deprived of any control whatsoever over its physical properties, and that such possession of Petitioner's roadbed by the United States continued until March 1st, 1920.

(5) That on the 14th day of June, 1921, Respondent instituted an action against Petitioner in the Circuit Court of Wyoming County, West Virginia, in which he alleged that the high waters of floods occurring in February, 1918, and July, 1919, had been diverted by the embankment forming Petitioner's roadbed upon the neighboring lands of Respondent, and had resulted in damage to Respondent's lands.

(6) Petitioner demurred to the declaration, as-

signing as a ground of demurrer that the said declaration and each count thereof showed on its face that the supposed cause of action arose at a time when the United States Government, acting under the authority of an Act of Congress, had taken possession of and was actually in possession of and operating Petitioner's line of railroad, and for that reason there was no liability upon this Petitioner by reason of the Acts set forth in the said declaration.

The said Circuit Court overruled the said demurrer, and Petitioner excepted to the action of the Court in overruling the demurrer. Thereupon, Petitioner filed a plea of general issue, and at the same time, as is permitted under the West Virginia practice, filed a special plea setting up that the supposed cause of action arose at a time when the United States Government, acting under the authority of an Act of Congress, had taken possession of and was actually in possession of, and operating, Petitioner's line of railroad, and that, therefore, there was no liability on Petitioner by reason of the damages caused by floods occurring during the period of Federal control.

(7) That upon the trial of the case, Petitioner requested said Circuit Court to instruct the jury that there was no liability upon Petitioner for any damages caused by floods occurring between December 28th, 1917, and March 1st, 1920, and that they should find for the defendant for any damages caused by floods occurring between said dates. The said Circuit Court refused said instruction, and said Petitioner excepted to the action of the Court in refusing said instruction.

(8) That the trial of the said case resulted in a

verdict in favor of Respondent and against Petitioner for the sum of $8,000.00.

The Petitioner moved said Circuit Court to set aside said verdict and grant it a new trial, assigning as reasons therefor that the Court had erred in refusing the instruction above set forth, and that under the facts of the case there was no liability upon Petitioner, because the damages proved had accrued during the period when the United States Government, acting under the authority of an Act of Congress, had possession and control of its property, but said Circuit Court overruled said motion for a new trial, and refused to set aside said verdict.

(9) Thereupon, Petitioner applied to the Supreme Court of Appeals of West Virginia for a writ of error and supersedeas to the said judgment in accordance with Sections 11 and 12 of Chapter 135 of the Code of West Virginia; that said Supreme Court of Appeals of West Virginia, deeming the judgment complained of plainly right, by an order entered on March 21st, 1924, rejected the application of Petitioner and refused to grant Petitioner a writ of error. Thereupon, Petitioner moved said Supreme Court of Appeals to reconsider its action in refusing said writ of error, but said Supreme Court of Appeals thereafter on the 27th day of June, 1924, and within three months from the date of presenting this petition, again entered an order refusing a writ of error and supersedeas to said judgment.

(10) That said judgment of the Circuit Court of Wyoming County is a judgment of highest court of the State of West Virginia, in which a decision in the suit

could be had, and that said Court decided against the claim of Petitioner, that under the Constitution and statutes of the United States there was no liability upon Petitioner for damages suffered to Respondent's land caused by the flood water of Slab Fork Creek being diverted upon and over the lands of Respondent by Petitioner's roadbed then under possession and control of the Federal Government.

(11) Petitioner respectfully represents that said Circuit Court of Wyoming County, West Virginia, erred in overruling Petitioner's demurrer to the declaration in refusing the instruction above set out and in overruling Petitioner's motion for a new trial for the reason that the damages complained of was the result of acts of the Federal Government acting under the authority of the laws of the United States, in maintaining said line of railroad during Federal control, and because Petitioner during said time, under the laws of the United States, was excluded by the Federal Government from all control over its roadbed.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the Circuit Court of Wyoming County, West Virginia, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Wyoming County in said case entitled "A. J. Mullens against The Virginian Railway Company, action of trespass on the case," to the end that the said case may be reviewed and determined by this Court as provided by Section 237 of the Judicial

Code as amended, and that your Petitioner may have such other and further relief or remedy in the premises as the Court may deem appropriate and in conformity with the provisions of law, and that the said judgment of the said Circuit Court of Wyoming County in said case and every part thereof may be reversed by this Honorable Court.

THE VIRGINIAN RAILWAY COMPANY,

By W. H. T. LOYALL,
H. T. HALL,
G. A. WINGFIELD,
Its Counsel.

W. H. T. LOYALL,
H. T. HALL,
M. P. HOWARD,
MARTIN & WINGFIELD,
Of Counsel for Petitioner.

STATE OF VIRGINIA,
CITY OF ROANOKE, } to-wit:

H. T. Hall and G. A. Wingfield, both being duly sworn, depose and say that they are counsel for the above named Petitioner, and that the matters and things in the foregoing petition are true to the best of their knowledge, information and belief.

Subscribed and sworn to before me this 14th day of August, 1924.

BERTHA FERS, *Notary Public.*

We do hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay, and that in our opinion the case is a proper one for the issuance of the writ of certiorari prayed for.

H. T. HALL.

G. A. WINGFIELD.

In the Supreme Court of the United States

OCTOBER TERM, 1924

No._____

THE VIRGINIAN RAILWAY COMPANY, a Corporation, *Petitioner*

vs.

A. J. MULLENS, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The facts necessary to a decision of this application may be briefly stated as follows:

The Respondent, by two certain deeds dated respectively in the years 1902 and 1904, conveyed to the Deepwater Railway Company, a West Virginia corporation, two strips of land situated in Wyoming County, West Virginia, for a railroad right-of-way. Prior to the year 1906, the said Deepwater Railway Company constructed its roadbed upon said strips of land, and shortly thereafter commenced the operation of a railroad thereover. By deed of April 22nd, 1907, the Deepwater Railway Company conveyed said strips

of land together with the railroad constructed thereon to your Petitioner, a Virginia corporation. From the date of said last mentioned deed until the beginning of Federal control on December 26th, 1917, the said railroad over the said strips of land was operated by your Petitioner. Respondent made no claim and gave no notice whatsoever to Petitioner that the railroad embankments constructed upon said strips of land diverted the waters of the stream and caused them to flow over and upon Respondent's adjacent land or in any manner constituted a nuisance. The two floods which caused the alleged damages to Petitioner's lands occurred in February, 1918, and July, 1919, at a time when the Federal Government was in the actual physical possession of the Virginian Railway Company's property. The alleged nuisance was created by the Deepwater Railway Company when the railroad was originally constructed. At the time the alleged damages occurred the alleged nuisance was being maintained by the United States Government. Your Petitioner, not being the creator of the alleged nuisance, and not being guilty of maintaining the alleged nuisance at the time the damages sought to be recovered in this action proved, denied liability for the alleged damages.

The question involved is that your Petitioner, being guilty of neither creating the alleged nuisance nor maintaining the alleged nuisance, is not liable for the alleged damages caused thereby. In the trial court this question was raised by demurrer, by plea, by instructions offered and by the motion to set aside the verdict and award a new trial.

ASSIGNMENTS OF ERROR

Your Petitioner assigns as error the action of the trial court in the overruling its said demurrer, in refusing to give instructions offered by your Petitioner, and in overruling your Petitioner's motion to set aside the verdict of the jury and award it a new trial, because in deciding each of these questions the said Court held in effect that your Petitioner was liable in damages for the alleged nuisance, although your Petitioner neither created nor maintained said nuisance.

The Federal question involved is that the alleged nuisance was being maintained at the time the alleged damages to Respondent's lands occurred by the United States Government and not by your Petitioner.

ARGUMENT

The Supreme Court of Appeals of West Virginia having refused an application for a writ of error to the judgment of the Circuit Court of Wyoming County, this Court should review the judgment of said Circuit Court on writ of certiorari.

Under the Code of West Virginia, Chap. 135, Sec. 1:

> "A party to a controversy in any Circuit Court may obtain from the Supreme Court of Appeals or a Judge thereof, in vacation, an appeal from, or a writ of error or supersedeas to, a judgment decree or order of such Circuit Court in the following cases:
>
> "(1) In civil cases where the matter in controversy, exclusive of cost, is of greater

value or amount than $100.00, wherein there is a final judgment or decree or order * * *."

Under Sec. 11 of Chap. 135 of the Code of West Virginia:

> "In a case wherein the Court shall deem the judgment decree or order complained of plainly right and reject it on that ground, no other petition therein shall afterwards be entertained. But the rejection of such petition by a Judge in vacation, shall not prevent the presentation of such petition to the Court when in session."

Chap. 135 West Virginia Code, Sec. 12, provides:

> "The Court or judge to whom a petition is duly presented, if of opinion that the decision complained of ought to be reviewed, may allow an appeal, writ of error or supersedeas, and may stay proceedings either in whole or in part."

The Judgment of the Circuit Court of Wyoming County, therefore, only became final upon the 27th day of June, 1924, the date of the last refusal of the writ of error by the Supreme Court of West Virginia. The statutes of Virginia and West Virginia upon the subject of granting writs of error are practically the same, and this was the conclusion reached by this Court in Andrews against The Virginian Railway Company, 248 U. S. 272.

NO LIABILITY UPON PETITIONER FOR DAMAGES CAUSED BY FLOODS OCCURRING DURING FEDERAL CONTROL

The diversion of a stream by filling in a natural channel is considered a nuisance, and liability therefor is placed on that ground.

McMechen vs. Hitchman-GlenDale Co. 88 W. Va. 633, 107 S. E. Rep. 480.

The rule of law is that liability for a nuisance arises only either from the wrongful act of creating the nuisance or the wrongful act of continuing a nuisance created by others. The mere ownership of property on which there exists a nuisance created by others does not make the owner liable for damages caused by the nuisance. In such cases the owner's liability for damages arises from the failure to abate the nuisance. The purchaser of property on which a nuisance has been created does not become liable until he has been notified to abate the nuisance.

20 Ruling Case Law, Nuisances, Section 14, 15 and 16, page 39 and following.

29 Cyclopedia, Law & Procedure, pages 1203 and 1204.

Case note 27 L. R. A. (N. S.) page 164.

Plumer vs. Harper, 14 American Decisions 333.

Note page 336.

As hereinbefore stated, the two floods which occurred in February, 1918, and July, 1919, are the only

floods which caused any appreciable damages to Respondent's lands. Both of these floods occurred during Federal control, and at a time when the Federal Government was in the actual physical possession of the line of the Virginian Railway. At that time the President had taken possession and control of Petitioner's line of railroad on December 28th, 1917, pursuant to the proclamation of December 26th, 1917 (40 Stat. L. 1733, under the Act of August 29, 1916, Chap. 418, 39 Stat. L. 619 and 645), and was operating the line of railroad through the Director General under the Federal Control Act (Act March 21, 1918, Chap. 25, 40 Stat. at L. 451). The effect of Federal control was to deprive Petitioner of all control, whatsoever, over its property, and to transfer the control of the property of Petitioner to the Government. During the period of Federal Control, Petitioner could do nothing whatever with respect to the maintenance of its physical properties, and consequently, could not have done anything to have prevented the damages caused by the two floods in question.

In Ault vs. Missouri Pac. Railroad Co., 256 U. S. 554, this Court has considered the effect of Federal control under the various statutes providing therefor, and it was held that under the law there was no liability upon railroad companies upon any cause of action arising out of the operation of their system of transportation by the Government.

Again, in N. C. Railroad Co. vs. Lee, 260 U. S. 16, it was held that the Government operated the railroads not as lessee, but under a right in the nature of eminent domain, and that actions for injuries suffered during

Federal control could not be maintained against the railroad.

It is, therefore, respectfully insisted that this action being an action for the maintenance of a structure, which constituted a nuisance, should have been brought, if at all, against the railroad administration, and that no liability arose upon Petitioner for damages arising during Federal Control out of the maintenance of its roadbed.

The question presented here has been before the State courts in one or two cases. In Atlantic Coast Line R. R. Co. vs. Southern Cotton Oil Mills, 129 Va. 323, 106 S. E. 337, the plaintiff's property was damaged by an insufficient pipe or culvert under the railroad causing the empounding of water on the property of the plaintiff. The pipe had been installed by the railroad company prior to Federal Control, but the damages had been caused both prior to Federal Control and during Federal Control. The Supreme Court of Virginia held that the Director General was liable for damages caused by the maintenance of the faulty construction of this pipe.

In Renno vs. Seaboard Air Line R. R. Co., 120 S. C. 7, 112 S. E. 439, the railroad company had constructed a fill with a culvert through the fill to carry off the water. The culvert was not sufficient in size to carry off water in times of freshets, and consequently, a pond was formed along the side of the railroad embankment. A small boy playing in the pond was drowned. The culvert and embankment had been constructed by the railroad company prior to Federal Control. The accident occurred during Federal Con-

trol. The South Carolina Court adhered to the doctrine of attractive nuisances, and consequently, neither the railroad company nor the Director General was liable. There was a motion for a directed verdict on the ground that the cause of action was not based upon any liability of the Director General of Railroads, as a common carrier, and was, therefore, without warrant of law. The Court overruled the motion, holding that the failure of the Director General to abate an attractive nuisance by enlarging the culvert to a proper size, showed a reckless disregard of the rights of children who might resort to the pond for pleasure, and it was, therefore, negligence. The court further held that under Section 10 of the Federal Control Act, the railroad administration was liable for maintenance of this nuisance, and that the railroad company being excluded from the control of its property, was not liable for the maintenance.

It is, therefore, respectfully submitted that the Circuit Court erred in holding that your Petitioner, the Virginian Railway Company, was liable for damages arising out of the maintenance of its roadbed during the period of Federal Control.

W. H. T. LOYALL,
H. T. HALL,
G. A. WINGFIELD,
Counsel for Petitioner.

M. P. HOWARD,
WILLIAMS, LOYALL & TUNSTALL,
MARTIN & WINGFIELD,
of Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1924

No. 619

THE VIRGINIAN RAILWAY COMPANY, *Petitioner*

vs.

A. J. MULLENS, *Respondent*

UPON A PETITION FOR WRIT OF CERTIORARI

Since the brief upon the petition for a writ of certiorari in this case was filed the case of Baggott vs. Southern Railway Company, 300 Fed. 337, has been published, and has just come to our attention. In that case the complainant alleged that the defendant in 1907 negligently constructed a trestle across a river in such a manner that there was not sufficient space for water to pass through the trestle freely when the river rose. The defendant knew that by reason of the changing condition of the ground the water was liable to rise more rapidly and to a greater height year by year and that the defendant, with full knowledge of this condition maintained the trestle in the negligent manner above described, that during the month of August, 1918, the river rose to a great height and by reason of

faulty construction and maintenance of the trestle plaintiff's land was overflowed and his crops damaged. The defendant demurred to the complaint upon the ground, among others, that the cause of action arose during federal control, and that no suit would lie against the railroad corporation but that the suit should be brought against the Director General or Federal Agent appointed by the President.

Judge Cochran sustained the demurrer in an exhaustive opinion which fully discusses the principle applicable to the case and which is absolutely at variance with the decision of the West Virginia Supreme Court in the case at bar.

Respectfully submitted,

W. H. LOYALL,
H. T. HALL,
G. A. WINGFIELD,
Counsel for Petitioner.

FILED
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Supreme Court of the United States

OCTOBER TERM, 1925

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37

No. 163

THE VIRGINIAN RAILWAY COMPANY, *Petitioner*

vs.

A. J. MULLENS, *Respondent*

UPON A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

REPLY BRIEF OF COUNSEL FOR PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1925

No. 163

THE VIRGINIAN RAILWAY COMPANY, *Petitioner*

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UPON A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

REPLY BRIEF OF COUNSEL FOR PETITIONER

In the brief of counsel for Respondent it is said that the statement of facts by counsel for Petitioner is incomplete, and in the opinion of counsel is incorrect and misleading. The controlling facts of the case are that in July, 1904, Respondent conveyed to the Deepwater Railway Company certain land to be used for railroad right of way. The Deepwater Railway Company proceeded to construct its roadbed on this and adjacent land. Respondent lived on the tract of land, a part of which had been conveyed to the railway company for right of way and as stated by him there was never a day while the railroad was being constructed that he did not observe the work being done. (R. pp.

28-29.) The railroad embankment constructed on or adjacent to Respondent's land was partly located in the channel of the stream. This resulted in changing to some extent the channel in the stream as was expressly provided for in the conveyance from Respondent. (R. p. 77.) No protest or objection was made by Respondent to the location or method of construction of the railroad roadbed.

In April, 1907, after the completion of the construction of the railroad the Deepwater Railway Company conveyed its line of railroad in West Virginia to Petitioner. Petitioner took possession of said railroad and operated same without change in the roadbed at the point in question until December 31, 1918, when the railroad was taken over by the United States Government. (R. p. 69.) The Government operated the railroad until March 1, 1920. Up to the time the Government took over the railroad no appreciable damage had been done to the Respondent's land, the first appreciable damage resulting from an ice freshet in February, 1918. (R. pp. 15, 29, 30.)

In July, 1919, there occurred an unusual freshet which caused the principal damage done to Respondent's land. The first protest or objection made by Respondent to Petitioner on account of the alleged nuisance caused by partly filling the channel of the stream was by letter dated April 4, 1920. (R. pp. 24, 71.) This letter shows that Respondent did not then know whether or not Petitioner had previous knowledge of the alleged nuisance and Respondent was not then asking to be compensated in damages.

In such cases as the one at bar the foundation of the cause of action is that a nuisance is created by obstructing the channel of a stream so as to change its current.

The cause of action in such cases does not arise out of contract and this is recognized by Respondent as his declaration is in tort. (R. p. 4.)

When the channel of a stream has been changed and results in washing the lands of an adjoining owner in periods of high water the damages resulting are treated as intermittent or temporary as distinguished from permanent damages and a new cause of action arises when each flood occurs from which damages result. Respondent, therefore, can only base a recovery in this case on a cause of action founded in tort and for damages actually accrueing during Federal Control. In Respondent's brief the liability of Petitioner is sought to be placed on two grounds, namely:

1. That Petitioner under the obligation of an express contract is subject to liability for the damages resulting from the alleged nuisance.

2. That independent of contract, Petitioner is liable for damages accrueing during Federal Control, on the ground that Petitioner had notice of the alleged nuisance prior to Federal Control, and was under a duty to abate or remove it.

The theory of Petitioner's contract liability is that the deed from Respondent to Petitioner conveying land for rights of way conveys such additional land as may be necessary for the slopes of cuts and fills and for changing the channels of streams, such additional land to be taken and so used as not to unnecessarily damage the residue of Respondent's land, and that the deed from the Deepwater Railway Company to Petitioner contains a provision under which the Petitioner assumes all lawful debts, liabilities, contracts and other obligations of the Deepwater Railway Company. From the provisions of the deed first above referred to

it is sought to interpret an express contract on the part of the grantee to construct a new channel for the stream and to use the additional land conveyed for that purpose. The language of the deed in question does not admit of such a construction. It might as well be argued that this language admits of the construction that the grantee could change the channel of the stream by constructing its roadbed partly therein as was done and should not be liable for any damages that necessarily result from that method of construction.

The ground of liability, if any, in this case under the law and under the allegations of Respondent's declaration is founded in tort and is for the maintenance of a nuisance or the failure to abate a nuisance. This liability arose when the floods occurred in February, 1918, and July, 1919.

The language of the second deed above referred to under which Petitioner assumes all debts, liabilities, contracts and other obligations of the Deepwater Railway Company, could not be construed as the assumption of a liability founded in tort which did not then exist and which came into existence many years after the execution of the deed, nor can this language properly be construed to impose upon Petitioner liability for a nuisance, which under the law is imposed upon the original creator of the nuisance. In relation to the alleged nuisance Petitioner stands in the same position of any other grantee who accepts a conveyance of land on which a nuisance has been created. The law as to the liability for an alleged nuisance in such cases is well settled and is stated as follows:

> "The liability for a nuisance springs from the wrongful act of creating or continuing it,

rather than from owning or occupying the premises. If the owner or the occupier of property creates a nuisance thereon, he is liable not because he owns or occupies the premises, but because he created the nuisance. And if the owner or occupier of property continues a nuisance created thereon by others, he is liable, not because he owns or occupies the premises, but because he does not abate the nuisance."

20 R. C. L., Nuisances, Sec. 14, p. 392.

The theory of Petitioner's liability on account of maintaining the nuisance and for failure to abate it is founded on the contention that Petitioner had notice of the nuisance and knowledge of its harmful effects on Respondent's lands. The law as to the liability of a purchaser of land for damages for a nuisance in existence at the time of the purchase is stated as follows:

"It is well settled that the purchaser of land on which a nuisance established by his grantor exists is not liable for merely permitting it to remain or for continuing it, in the absence of a prior notice or request for its removal by the person injured. And so it is held that one who inherits property is not liable for a nuisance created thereon during the existence of the precedent estate. But the doctrine is also recognized that a person who continues a nuisance is liable without a request to remove it if the nuisance results from a continuance by affirmative acts rather than from an omission to take active measure to abate it."

20 R. C. L., Nuisances, Sec. 16, p. 392.

For notice to or knowledge of Petitioner of the

existence of the nuisance, Respondent relies on the testimony of Lovern, Respondent's section foreman (R. p. 56) and Traugott, Respondent's assistant chief engineer. (R. p. 69.) The witness Lovern testifies that a stonemason contractor was removing rocks from the side of the railroad fill and that he prohibited him from doing so. The witness, Traugott testifies that the railroad roadbed located opposite the Mullens land has remained in practically the same condition from the time it was built until the flood fo July 15, 1919. No notice to or knowledge of the alleged nuisance to Petitioner can be inferred from this evidence. Especially is this true when Respondent acquiesced in the construction of the alleged nuisance and in its maintenance without protest or objection until April 4, 1920, as above shown. Petitioner, for aught this evidence shows, may have been ignorant of the harmful effects of the alleged nuisance or may have reasonably presumed that the alleged nuisance was voluntarily submitted to by Respondent, and under such circumstances there could be no recovery for the alleged injury.

Union Pac. Ry. Co. v. Campbell, 236 Fed. 708.

The cases cited by Respondent on the question of Petitioner's liability for damages during Federal Control are not in conflict with the principles on which Petitioner relies.

The case of Cumberland Telegraph & Telephone Company vs. Lawrence, 271 Fed. 89, arose out of an accident which occurred during Federal Control. The accident was caused by a guy wire installed in a street by a telephone company long prior to Federal

Control and liability was placed on the ground that the telephone company was the creator of the nuisance which existed by reason of locating and maintaining the guy wire in the street.

The case of Hines vs. Woodson, 280 Fed. 966, involved a claim for damages which arose out of the obstruction of a stream by a bridge built by the railroad company many years before Federal Control. The Director General of Railroads was alone sued and it was held that there was no liability without previous notice to the Director General for the obstruction of a stream by his predecessor in title. The question of the liability of the railroad company was not involved.

The case of Brown vs. St. Louis & San Francisco Railroad Company, 268 S. W. 679, was a suit against the railroad company for damages accrueing during Federal Control resulting from the obstruction of a stream by a bridge constructed by the railroad company prior to Federal Control. The liability of the railroad company was placed on the ground that it was the creator of the nuisance and hence this case is not in point on the question here involved.

The case of L. & N. Ry. Co. vs. Tuttle, 258 S. W. 688, arose out of the failure of the railroad company to construct approaches to grade crossings pursuant to its contract with the landowner entered into prior to Federal Control. The liability of the railroad company for the damages resulting to the landowner was predicated upon a breach of its contract and the court held that the railroad company had ample time in which to comply with its contract prior to Federal Control.

The case of McPhearson County vs. Director General of Railroads, et al, 203 Pac. 912, was a joint action against the Railroad Administration and the Railroad

Company to recover the cost of the construction of a bridge which had been washed away by a flood during Federal Control. The bridge in question formed a part of an approach to a road crossing over the railroad tracks. The liability of the railroad company was placed on the ground that it was its duty under the law to maintain the crossing, including the approaches of which the bridge was an essential part and therefore the railroad company was liable for the cost of rebuilding the bridge. The liability in this case arose out of a duty imposed on the railroad company by law and hence the case has no application to the question here involved.

The case of, In re, Morris Avenue bridge, 174 N. Y. Sup. 682, has no application to the question here involved because the liability of the railroad company in that case arose out of a statutory duty imposed upon the railroad company.

The case of Baggott vs. S. Ry. Co., 300 Fed. 337, relied on by Petitioner has been criticised and expressly disapproved by the Court of Appeals of Missouri. In this case the railroad company was alone sued for flooding land during Federal Control by reason of a defective trestle previously constructed by the railroad company. The Railroad Administration was not a party to the suit and its liability was not passed upon and the court in the opinion said that its liability could be passed upon in a suit for which ample provision had been made.

The principle that the creator of a nuisance is liable for damages resulting therefrom, and that the successor in title is not liable in the absence of notice to abate, was recognized by the court, but were held not applicable in this case because the defendant's prop-

erty had been taken away from it by a power in the nature of eminent domain. The court further held that the Government, in taking charge of the railroads and operating them during Federal Control was not in the situation of the ordinary grantee under a deed with warranty of title or a lessee under a lease. The court was of opinion that the defendant on account of being deprived of all power over its property and of the persons in control of it should not be liable for damages resulting from a nuisance during Federal Control although the nuisance was created by it prior to Federal Control. The doctrine of this case is especially applicable to the situation in the case at bar, even though Petitioner's liability could be placed on the ground that it stood in the position of the creator of the nuisance, because Petitioner is not shown prior to Federal Control to have had any knowledge of the harmful nature of the alleged nuisance or that Respondent had not voluntarily submitted to the alleged nuisance.

It is respectfully submitted that the errors assigned to the judgment of the Circuit Court of Wyoming County, West Virginia, should be sustained and that said judgment should be reversed by this court.

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FILED
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WM. R. STANSBU
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 163

THE VIRGINIAN RAILWAY COMPANY, *Petitioner*

vs.

A. J. MULLENS, *Respondent*

UPON A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF WYOMING COUNTY, STATE OF WEST VIRGINIA

BRIEF OF COUNSEL FOR PETITIONER

ROANOKE PRINTING CO., INC., ROANOKE, VA.

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Y. & M. V. RR. Co. vs. Clarksdale, 257 U. S. 10, 7, 14.

TEXT BOOKS

29 Cyc. 1203 & 1204, p. 16.

20 Ruling Case Law, Nuisances, Sections 14, 15 & 16, p. 391, p. 16.

STATUTES

Act of Aug. 29, 1916, c. 418, 39 Stat. L. 619, 645; p. 7, 16.

Act of Mar. 21, 1918, c. 25, 40 Stat. L. 451, p. 7, 14, 16.

Proclamation of the President, Dec. 26, 1917, 40 Stat. L. 1733, p. 7, 13, 16.

Act Feb. 28, 1920, c. 91 Sec. 200, 41 Stat. L. 457, p. 7, 14.

Judicial Code 237 as amended Act Dec. 23, 1914, c. 2; Act Sept. 6, 1916, c. 448, Sec. 2; Act Feb. 17, 1922, c. 54 (36 Stat. L. 1156, 38 Stat. L. 790, 39 Stat. L. 726, 42 Stat. L. 366), p. 7, 11.

West Virginia Code c. 135, Sec. 1, 9, 11, 12, p. 7, 10, 11.

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BRIEF OF COUNSEL FOR PETITIONER

STATEMENT OF GROUNDS OF JURISDICTION

This is a writ of certiorari to review a judgment of the Circuit Court of Wyoming County entered on the 1st day of December, 1923 (R. 9).

A petition for a writ of error to said judgment was presented to the Supreme Court of Appeals of West Virginia, the highest court in said State, and the writ of error applied for was refused by order dated the

21st day of March, 1924 (R. 1). Subsequently, petitioner presented a petition for a writ of error to said Court, but the said petition was again refused on the 27th day of June, 1924, and the Court entered an order refusing a writ of error and supersedeas to said judgment (R. 1). No opinion was delivered by said Supreme Court of Appeals of West Virginia.

On the 14th day of June, 1921, respondent instituted an action against the petitioner in the Circuit Court of Wyoming County, West Virginia. In his declaration it is alleged that Petitioner in and about the year 1904, had constructed an embankment for its roadbed along Slab Fork Creek in said county and had cast into the said creek stones and dirt thereby filling up the channel of said creek, diverting the waters of the creek upon the adjacent lands of the respondent, and that on numerous occasions from the date of said diversion to the time of the institution of the suit, and particularly on the 15th day of July, 1919, by reason of the alleged wrongful filling up of the channel of said stream, the waters of said stream were diverted from the natural channel and thereby caused to wash away the soil, trees, etc., of the respondent's land, thereby causing him great damage (R. 4 and 5).

Petitioner demurred to said declaration upon the ground that it showed that the cause of action arose in July, 1919, at which time petitioner's railroad was under the control and in the possession of the United States Government (R. 7).

The Court overruled said demurrer (R. 9).

Petitioner thereupon filed its plea of the general issue and its plea of the statute of limitations (R. 6 & 7).

Upon the trial of the case it appeared that at the time that the floods which damaged respondent's land occurred, petitioner's railroad was in actual possession of and being operated by the United States Government, and that petitioner was wholly without any control over its said railroad (R. 16 & 18).

It further appeared that the fill which it is claimed caused respondent's damages was constructed by the Deepwater Railway Company, the petitioner's predecessor in title (R. 67 & 68). Petitioner requested the court to instruct the jury that there was no liability upon petitioner for damage caused by floods occurring between December 28, 1917, and March 1, 1920, but the court refused to give said instruction and respondent duly excepted (see defendant's instruction No. 4, R. 84).

The court over petitioner's objection and upon motion of respondent instructed the jury that if the obstructions were placed in the stream as alleged in the declaration and were not in any way due to or caused by the operation of the petitioner's railroad by the United States Railroad Administration, then the fact that the said railroad was operated and controlled by said Railroad Administration at the time the damages or any of them occurred, constitutes no defense to the action (Plaintiff's instruction No. 6, R. 83). A motion for a trial was made and overruled (R. 9).

The action of the court in overruling the demurrer, in refusing to give instruction No. 4 for petitioner and giving instruction No. 6 for respondent, and in overruling the motion for a new trial, were the subjects of assignments of error in the petition for a writ of error to the West Virginia Supreme Court (R. 2).

The claim made by the petitioner in the court be-

low was that being guilty of neither creating nor maintaining the alleged nuisance, no liability exists against petitioner for damage occasioned thereby, and that petitioner's railroad being then under the exclusive control of the United States Railroad Administration, the liability, if any, for maintenance of the alleged nuisance was upon the United States and not upon the petitioner.

STATUTES RELIED UPON

Act of August 29, 1916, c. 418, 39 Stat. L. 619, 645; Act of March 21, 1918, c. 25, 40 Stat. L. 451.

Proclamation of the President December 26, 1917, 40 Stat. L., 1733.

Act February 28, 1920, c. 91 Sec. 200, 41 Stat. L. 457.

Judicial Code 237 as amended Act December 23, 1914, c 2; Act September 6, 1916, c 448, Sec. 2; Act February 17, 1922, c 54 (36 Stat. L., 1156, 38 Stat. L. 790, 39 Stat. L., 726, 42 Stat. L. 366).

West Virginia Code c 135, Sec. 1, 9, 11, 12.

CASES RELIED UPON TO SUSTAIN JURISDICTION

Supreme Lodge K. P. vs. Meyer, 265 U. S. 30;

Y. & M. V. RR. Co. v. Clarksdale, 257 U. S. 10;

American Ry. Express Co. vs. Levee, 263 U. S. 19;

Andrews vs. Virginian Ry. Co. 248 U. S. 272.

STATEMENT OF THE CASE

The Respondent by two certain deeds dated respectively in the years 1902 and 1904 conveyed to Deepwater Railway Company two strips of land situated in Wyoming County, West Virginia, for railroad right of way (R. 27, 77, 78 and 79). Prior to the year 1906 the said Deepwater Railway Company constructed its roadbed upon said strip of land and shortly thereafter commenced the operation of a railroad thereover. The said railroad was constructed according to the most approved engineering methods, and in the construction of the railroad it was necessary to encroach to some extent upon the waters of the Slab Fork Creek (R. 66, 68 and 71).

By deed dated the 22nd of April, 1907, the Deepwater Railway Company, a West Virginia corporation, conveyed said strips of land, together with the railroad thereon, to your petitioner, a Virginia corporation (R. 68 and 71). From the date of the last mentioned deed until the beginning of the federal control on December 26, 1917, the said railroad was operated by your petitioner and the cuts and fills remained in practically the same condition from the time of the construction of the railroad by the Deepwater Railway Company until after the beginning of Federal control (R. 69).

Resppondent made no claim and gave no notice whatsoever to petitioner that the railroad embankment constructed upon said strips of land diverted the waters of the stream and caused them to flow over and upon respondent's adjacent land or in any manner constituted a nuisance (R. 24, 68).

Prior to February, 1918, no appreciable damage

was done to respondent's land. In February, 1918, a flood occurred which did considerable damage to respondent's land, and in July, 1919, another flood occurred which did still greater damage to respondent's land. It is only on these two occasions that any appreciable damage was done to respondent's land (R. 15). At the time of these two floods the Federal Government was in actual physical possession of the Virginian Railroad, and the petitioner was entirely excluded from any participation in the maintenance of the roadbed (R. 16, 30, 54 and 71).

The alleged nuisance was created by the Deepwater Railway Company when the railroad was originally constructed. At the time the alleged damages occurred, the alleged nuisance was being maintained by the United States Government. Your petitioner not being the creator of the alleged nuisance, and not being guilty of maintaining the alleged nuisance at the time the damages sought to be recovered in this action were sustained denied liability for the alleged damages. The jury returned a verdict against petitioner for the sum of $8,000.00 and the court entered judgment against petitioner for that amount. The precise question involved is whether or not your petitioner, being guilty of neither creating nor maintaining after notice to abate the alleged nuisance, can be held liable for damage caused thereby, at a time when petitioner was deprived by law of the right to abate the nuisance.

ASSIGNMENTS OF ERROR

1. The Court erred in overruling petitioner's demurrer to declaration (R. 7, 9).

2. The Court erred in refusing petitioner's instruction No. 4 (R. 84).

3. The Court erred in giving respondent's instruction No. 6 (R. 83).

4. The Court erred in overruling petitioner's motion for new trial (R. 9).

SUMMARY

The Supreme Court of Appeals of West Virginia having refused an application for writ of error to the judgment of the Circuit Court of Wyoming County, this court should review the said judgment upon writ of certiorari.

> "A party to a controversy in any Circuit Court may obtain from the Supreme Court of Appeals or a Judge thereof, in vacation, an appeal from, or a writ of error or supersedeas to a judgment decree or order of such Circuit Court in the following cases: In civil cases where the matter in controversy, exclusive of cost, is of greater value or amount than $100.00 wherein there is a final judgment or decree or order * * *."
>
> W. Va. Code, c 135, Sec. 1.

> "The petition shall be presented to the Supreme Court of Appeals or to a Judge thereof."
>
> W. Va Code, Chapter 135, Section 9.

> "In a case wherein the Court shall deem the judgment decree or order complained of plainly right and reject it on that ground, no other petition therein shall afterwards be entertained. But the rejection of such petition by a judge in vacation shall not prevent

the presentation of such petition to the Court when in session."

W. Va. Code, c 135, Sec. 11.

"The Court or judge to whom a petition is duly presented, if of opinion that the decision complained of ought to be reviewed, may allow an appeal, writ of error or supersedeas, and may stay proceedings either in whole or in part."

W. Va. Code, c 135, Sec. 12.

The judgment of the Circuit Court of Wyoming County, therefore, only became final upon the 27th day of June, 1924, the date of the last refusal of the writ of error by the Supreme Court of West Virginia.

Am. Ry. Express Co. v. Levee, 263 U. S. 19;
Andrews v. Vgn. Ry. Co. 248 U. S. 272.

The Supreme Court of the United States has jurisdiction to review the decision of the highest court of the State of West Virginia by writ of certiorari.

"It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, where is drawn in question ***; or where any right, title, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United

States, and the decision is either in favor of or against the title, right, or privilege, or immunity especially set up or claimed by either party, under such Constitution, treaty, statute, commission or authority."

36 Stat. L. 1156;
38 Stat. L. 790;
39 Stat. L. 726;
42 Stat. L. 366.

"The President, in time of war, is impowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereof, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

39 Stat. L. 645.

"Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, do hereby, through Newton D. Baker, Secretary of War, take possession and assume control at 12 o'clock noon on the 28th day of December, 1917, of each, and every system of transportation and the appurtenances thereto located wholly or in part within the boundaries of the continental United States and consisting of railroads and owned or controlled systems of coastwise and inland transportation engaged in general transportation, whether operated by steam or by electric power, includ-

ing also terminals, terminal companies, and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines, and all other equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail-and-water systems of transportation; to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material, and equipment, to the exclusion so far as may be necessary of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers.

"It is hereby directed that the possession, control, operation, and utilization of such transportation systems, hereby by me undertaken, shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads. Said director may perform the duties imposed upon him, so long and to such extent as he shall determine, through the boards of directors, receivers, officers, and employees of said systems of transportation. Until and except so far as said director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the names of their respective companies."

40 Stat. L. 1733.

"Section 10, That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws, or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President."

Act approved March 21, 1918.
40 Stat. L. 451.

"Federal control shall terminate at 12:01 A. M., March 1, 1920, and the President shall then relinquish possession and control of all railroads and systems of transportation then under federal control and cease the use and operation thereof."

Act February 28, 1920, Chap. 91, Sec. 200.
41 Stat. L. 457.

The petitioner claimed immunity under the Federal Control Act and the proclamations of the President and Acts of the Railroad Administration in taking over the petitioner's railroad and the decision was against such immunity. Under such circumstances this Court will review such a decision by certiorari.

Supreme Lodge K. P. v. Meyer, 263 U. S. 30;
Y. & M. V. RR. Co. vs. Clarksdale, 257 U. S. 10.

A railroad company is not liable for the acts of the United States Railroad Administration during Federal control and hence is not liable for the failure of the Railroad Administration to abate a nuisance on property owned by the Railroad Company.

Mo. Pac. R. Co. v. Ault, 256 U. S. 554;
N. C. RR. Co. v. Lee, 260 U. S. 16;

Atl. Coast Line RR. Co. v. Southern Cotton Oil Mills, 129 Va. 323, 106 S. E. 337;
Renno v. Seaboard Air Line RR. Co. 120 S. C. 7, 112 S. E. 439;
Baggott vs. S. Ry. Co. 300 Fed. 337;
L. & N. R. Co. v. Jackson, 270 S. W. 58.

ARGUMENT

The Supreme Court of Appeals of West Virginia having refused an application for a writ of error to the judgment of the Circuit Court fo Wyoming County, this Court should review the judgment of said Circuit Court on writ of certiorari.

The judgment of the Circuit Court of Wyoming County, only became final upon the 27th day of June, 1924, the date of the last refusal of the writ of error by the Supreme Court of West Virginia. The statutes of Virginia and West Virginia upon the subject of granting writs of error are practically the same, and this was the conclusion reached by this Court in Andrews vs. The Virginian Railway Company, 248 U. S. 272.

See also Am. Ry. Ex. Co. vs. Levee 263 U. S. 19.

NO LIABILITY UPON PETITIONER FOR DAMAGES CAUSED BY FLOODS OCCURRING DURING FEDERAL CONTROL.

The diversion of a stream by filling in a natural channel is considered a nuisance, and liability therefor is placed on that ground.

McMechen vs. Hitchman-Glen Dale Co., 88 W. Va. 633, 107 S. E. Rep. 480.

The rule of law is that liability for a nuisance

arises only either from the wrongful act of creating the nuisance or the wrongful act of continuing a nuisance created by others. The mere ownership of property on which there exists a nuisance created by others does not make the owner liable for damages caused by the nuisance. In such cases the owner's liability for damages arises from the failure to abate the nuisance. The purchaser of property on which a nuisauce has been created does not become liable until he has been notified to abate the nuisance.

20 Ruling Case Law, Nuisances, Sections 14, 15 and 16, page 391 and following.

29 Cyclopedia, Law & Procedure, pages 1203 and 1204.

Case note 27 L. R. A. (N. S.), page 164.

Plumer vs. Harper, 14 American Decisions 333. Note page 336.

Baggott vs. So. Ry. Co. 300 Fed. 337.

As hereinbefore stated, the two floods which occurred in February, 1918, and July, 1919, are the only floods which caused any appreciable damages to respondent's lands. Both of these floods occurred during Federal control, and at a time when the Federal Government was in the actual physical possession of the line of the Virginian Railway. At that time the President had taken possession and control of Petitioner's line of railroad on December 28th, 1917, pursuant to the proclamation of December 26th, 1917 (40 Stat. L. 1733, under the act of August 29, 1916, Chap. 418, 39 Stat. L. 619 and 645), and was operating the line of railroad through the Director General under the Federal Control Act (Act March 21, 1918, Chap. 25, 40 Stat. at L. 451). The effect of Federal control was to deprive Petitioner of all control, whatsoever, over its

property, and to transfer the control of the property of Petitioner to the Government. During the period of Federal control, Petitioner could do nothing whatever with respect to the maintenance of its physical properties, and consequently, could not have done anything to have prevented the damages caused by the two floods in question.

The liability for damages occasioned by the two floods occurring during federal control, if it can be sustained at all, must be predicated upon the negligent maintenance of the roadbed, and not upon the original construction of the roadbed. State ex rel Missouri Pacific Railway Co. vs. Allen 267 Southwestern 960.

In Mo. Pac. R. Co. v. Ault, 256 U. S. 554, this Court has considered the effect of Federal control under the various statutes providing therefor, and it was held that under the law there was no liability upon railroad companies upon any cause of action arising out of the operation of their system of transportation by the Government.

Again, in N. C. Railroad Co. vs. Lee, 260 U. S. 16, it was held that the Government operated the railroads not as lessee, but under a right in the nature of eminent domain, and that actions for injuries suffered during Federal control could not be maintained against the railroad company.

It is, therefore, respectfully insisted that this action being an action for the maintenance of a structure, which constituted a nuisance, should have been brought, if at all, against the railroad administration, and that no liability exists upon petitioner for damages arising during Federal Control out of the maintenance of its roadbed.

The question presented here has been before the

State courts in several cases. In Atlantic Coast Line R. R. Co vs. Southern Cotton Oil Mills, 129 Va. 323, 106 S. E. 337, the plaintiff's property was damaged by an insufficient pipe or culvert under the railroad causing the impounding of water on the property of the plaintiff. The pipe had been installed by the railroad company prior to Federal Control, but the damages had been caused both prior to Federal Control and during Federal Control. The Supreme Court of Virginia held that the Director General was liable for damages caused by the maintenance of the faulty construction of this pipe.

In Renno vs. Seaboard Air Line R. R. Co., 120 S. C. 7, 112 S. E. 439, the railroad company had constructed a fill with a culvert through the fill to carry off the water. The Culvert was not sufficient in size to carry off water in times of freshets, and consequently, a pond was formed along the side of the railroad embankment. A small boy playing in the pond was drowned. The Culvert and embankment had been constructed by the railroad company prior to Federal Control. The accident occurred during Federal Control. An action was brought against both the railroad company and the Director General of Railroads. The railroad company demurred to the complaint on the ground that the cause of action was solely against the Director General of Railroads. The demurrer was sustained, and the case against the Director General of Railroads went to trial. There was a motion for a directed verdict on the ground that the cause of action was not based upon any liability of the Director General of Railroads, as a common carrier, and was, therefore, without warrant of law. The Court overruled the motion, holding that the failure of the Director Gen-

eral to abate an attractive nuisance by enlarging the culvert to a proper size, showed a reckless disregard of the rights of children who might resort to the pond for pleasure, and it was, therefore, negligence. The court further held that under Section 10 of the Federal Control Act, the railroad administration was liable for maintenance of this nuisance.

The case of L. & N. R. R. Co. vs. Jackson, 270 S. W. 58, decided by the Supreme Court of Alabama was a case in which the railroad company was sued for not maintaining a station during federal control. The railroad company had contracted to maintain a station at that location. When the Director General of Railroads took charge under federal control the station was torn down and removed and discontinued as a railroad station. After federal control ended, the railroad company failed to rebuild and reestablish the station. The party with whom the contract to maintain the station was made sued for damages for failure to maintain the station both during and after federal control. The court held that the railroad company was liable for such damages as accrued after federal control, but was not liable for damages which accrued during federal control. The case in effect holds that a railroad company is not liable for damages occurring during federal control because during that period the railroad company was without power or authority to exercise any control over its property.

In Baggott vs. Southern Ry. Company, 300 Fed. 337, the complainant alleged that the defendant in 1907 negligently constructed a trestle across a river in such manner that there was not sufficient space for water to pass through the trestle freely in flood periods. The defendant knew that by reason of the changing condi-

tion of the ground the water was liable to rise more rapidly and to a greater height year by year, and the defendant, with full knowledge of this condition, maintained the trestle in the negligent manner above described. During the month of August, 1918, the river rose to a great height and by reason of the faulty construction and maintenance of the trestle plaintiff's land was submerged and his crops damaged. The defendant demurred to the complaint upon the ground, among others, that the cause of action arose during federal control, and consequently, no liability existed against the railroad corporation, and that the suit should be brought against the Director General of Railroads appointed by the President.

The Court sustained the demurrer in an exhaustive opinion which fully discusses the principle applicable to such cases. The conclusion reached is absolutely at variance with the decision of the West Virginia Supreme Court in the case at bar.

It is, therefore, respectfully submitted that the Circuit Court erred in holding that your Petitioner, The Virginian Railway Company, was liable for damages arising out of the maintenance of its roadbed during the period of Federal Control.

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Office Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1925.

NO. 169.

THE VIRGINIAN RAILWAY COMPANY, *Petitioner*,

vs.

A. J. MULLENS, *Respondent*.

UPON A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA.

BRIEF OF COUNSEL FOR RESPONDENT.

LOVETT PRINTING CO., LAW PRINTERS, CHARLESTON, W. VA.

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STATEMENT OF THE CASE.

The statement of counsel for the Petitioner is incomplete, and in our opinion is incorrect and misleading in certain instances. Therefore, we state the facts necessary to a determination of the points in controversy as follows:

In 1904, the Respondent conveyed to Deepwater Railway Company a described strip of land for a right of way for a railroad, "together with such additional land on either side of the strip hereinafter described, as may be

necessary for the slopes of cuts and fills and for changing the channels of streams, *such extra widths to be taken and used so as not to unnecessarily damage the residue of the land*". (R. 77). Shortly after this deed was made said Company entered upon the strip of land so acquired from the respondent, and other lands acquired from others for the same purpose, and constructed a railroad, which was completed on March 1, 1906. (R. 12 and 67). In constructing said railroad, the channel of Slab Fork Creek was filled up about two-thirds of the distance across it and for a distance of about four hundred feet up and down the stream on the bank thereof opposite the residue of respondent's land, and the bed of the remainder of the channel of the stream was covered with large boulders for a considerable distance up and down the same. (R. 13 and 81 map).

By deed dated April 22, 1907, (R. 71), said Deepwater Railway Company conveyed all its property, rights, privileges and franchises, including the property and rights conveyed to it by respondent, to the petitioner, and, as a part of the consideration for such conveyance, the petitioner assumed all lawful debts, liabilities, contracts and other obligations of said Deepwater Railway Company (R. 76). The petitioner has owned said railroad at all times since and has at all times since operated said railroad except during the time that the same was operated by the United States Government.

Immediately after said fill was made, the water was forced out of the natural channel of the stream and onto and over respondent's land, at each time there was a rise, but, due to the fact that trees, bushes, etc., were growing on the bank, no great amount of the land was washed until after these bushes and trees had been undermined and washed away, leaving the bank unprotected (R. 15

and 16). These conditions were known to and observed all along by the representatives of the petitioner (R. 56 and 69).

In February, 1918, and in July, 1919, unusually high rises occurred in the stream, and due to the fact that the protection afforded by the trees and shrubbery had been washed away, the water was forced out of the channel of the stream and over respondent's land, and did the principal part of the injury for which damages were recovered in this action (R. 15, 16, 17, 18 and 19). This action was instituted on June 14, 1921, and the declaration was filed July 6, 1921, and was continued from time to time until November 9, 1922, when the petitioner filed a plea of the general issue, a special plea of the statute of limitations and a special demurrer in which it set up the fact that it was not liable on account of its road being in the possession and control of the United States Government at the time the principal part of the injury was done (R. 3, 4, 5, 6, 7 and 8). This demurrer was overruled (R. 9), and the petitioner requested the Court to instruct the jury that it was not liable for any injury that occurred between December 28, 1917, and March 1, 1920, which the Court refused (R. 84). There was a verdict and judgment for the plaintiff, and the highest Court of the State of West Virginia having refused to review this judgment, the case was brought to this Court on a writ of certiorari.

PROPOSITIONS RELIED UPON.

1. Where, in 1904, a land owner conveyed to a Railroad Company a described strip of his land for a railroad right of way, "together with such additional land on either side of the strip" * * * "as may be necessary for the slopes of cuts and fills and for changing the channels of streams, such

extra widths to be taken and used so as not to unnecessarily damage the residue of the land", such a provision in the deed constitutes a contract between the land owner and the Railroad Company, and if it constructs its railroad on such right of way in such manner as to constitute a violation of such contract and also as to constitute a recurring, intermittent continuing nuisance, it will be held liable to such land owner for such damages as he may sustain by reason of such violation of such contract and also by reason of the construction and maintenance of such nuisance. A. J. Mullens vs. Vgn. Ry. Co., (W. Va.) 123 S. E. 287. Cline vs. N. & W. Ry. Co., 69 W. Va. 436, 71 S. E. 705. Covert vs. C. & O. Ry. Co., 85 W. Va. 64, 100 S. E. 854. Taylor vs. C. & O. Ry. Co., 84 W. Va. 442, 100 S. E. 218.

2. Where, in 1907, after such Railroad Company has completed the construction of its railroad on such right of way, in such manner as to violate such contract and also to constitute a recurring, intermittent continuing nuisance, it conveys all its property, rights, privileges and franchises of every kind and nature, including the rights so conveyed by such land owner, to another Railroad Company which is a part of the consideration for such conveyance, assumes all its "debts, liabilities, contracts and other obligations", such other Railroad Company will be held liable to such land owner for such damages as he may thereafter sustain as a result of the violation of such contract and the continuance of such nuisance. A. J. Mullens vs. Vgn. Ry. Co., *Supra;* Gwinn vs. Ohio River Rd. Co., 46 W. Va., 151, 33 S. E. 87, 76 A. S. R. 806; Union Trust Co. vs. Cuppy, 26 Kan. 754; Central Trust Co. vs. Wabash Ry. Co., 57 Fed. 441.

3. In an action by such land owner against such other Railroad Company to recover damages sustained by him on account of the washing away

and destroying of the residue of his land, and the fencing and crops thereon, which was due and caused by the improper and unlawful manner in which such Railroad Company constructed its railroad, and in which such other Railroad Company continued and maintained the same, with full and complete knowledge and notice of the fact that such manner of construction was in violation of such contract and also constituted a recurring, intermittent continuing nuisance and of the injurious effects thereof, and without making any effort to comply with the provisions of the contract or to abate the nuisance or its injurious effects, the fact that its railroad was under the control of and being operated by the Government, pursuant to the acts of Congress and the proclamations and orders of the President, at the time when the greater part of the damages sued for occurred, constitutes no defense to such action unless it is shown that such other Railroad Company had not had an opportunity to comply with such contract and thereby abate such nuisance at any time prior to the taking over of its railroad by the Government, or that it was prevented from doing so by reason of such control and operation of its railroad by the Government. Cumberland Telegraph and Telephone Co. vs. Lawrence, 271 Fed. 81; Hines vs. Woodson, 280 Fed. 966; Brown vs. St. L. & S. F. Ry. Co., (Mo.) 268 S. W. 679; L. & N. Rd. Co. vs. Tuttle, 258 S. W. 688; McPherson County vs. U. S. Rd. Admin. (Kan.) 203 P. 912.

ARGUMENT.

The petitioner bases the contention that it is not liable for the damages resulting from the injury done to the land by the washing away, during the period of federal control, upon the fact that the obstruction, which it

terms a "nuisance", was created and placed in the stream by its predecessor, the Deepwater Railway Company, and also upon the theory and pretense, set up for the first time in its argument in this Court, that it had no notice or knowledge of the existence of this nuisance until after its railroad had been taken over by the Government under the Federal Control Act, and, being deprived of all power and authority to abate this nuisance at any time during Federal Control, the Government, and not the petitioner, is liable for the injury that occurred during federal control.

If the petitioner can escape liability because it did not create the obstruction which caused the injury and was ignorant of its existence from the time it purchased the railroad until federal control commenced, it is likely that the Government could also escape liability on the same ground, and the respondent left without remedy for the serious injury which he has suffered.

Whether the "nuisance" consists of the structure which was placed in the channel of the stream, or the effects produced by that structure forcing the water from its natural and proper channel over and against respondent's land, the contention is not based on the actual facts and the theory is incorrect. Whether the thing or condition which caused the injury to plaintiff's land is properly termed a nuisance, the petitioner cannot deny full and complete knowledge and notice of its existence. At the time it purchased the railroad in 1907, the deed under which it claimed title to its right of way through the respondent's land was on record, and that deed showed on its face, in plain and unmistakable language, that it was acquiring a right, which respondent had conveyed to its predecessor, to take a sufficient amount of respondent's land, in addition to the strip on which its railroad had

been built, to widen the channel of this stream, and that it was required by a provision in said deed to take and use such additional portion of respondent's land in such a manner as to protect the residue thereof. In addition to this, it could be plainly seen on the ground that two-thirds of the bed of the stream had been filled up in constructing the bed for the railroad, and that the remainder of the bed of the stream had been covered up with large boulders. All along, during all the time, from the purchase of the railroad up to the time federal control commenced, the agents and servants of the petitioner could plainly see and observe the effects that this choking of the stream was continuously taking upon the respondent's land by washing away the trees and shrubbery which had theretofore protected and preserved the banks. They could also plainly see that the petitioner's predecessor had not complied with its contract by which it was bound to widen the channel of this stream and thereby protect respondent's land. The testimony of petitioner's own witnesses, Lovern, the section foreman (R. 56), and Traugett, the chief engineer (R. 69), shows that it had full and complete knowledge of the existence of this nuisance.

The theory upon which the contention is based is incorrect, not only because the petitioner and its predecessor was under a contractual obligation to correct the conditions which resulted in the injury to the respondent, but also because it had full and complete knowledge of the existence of the nuisance and the evil effects which it was having and would plainly continue to have upon respondent's land.

During the pendency of this action in the Courts of the State of West Virginia, the respondent instituted a suit in chancery, in the Circuit Court of Wyoming

County, West Virginia, in which he sought the issuance of a mandatory injunction to compel the petitioner to abate the nuisance which caused the injury resulting in the damages sued for in this action, and the petitioner based its chief defense in that chancery proceeding on the fact that its predecessor acquired the right to obstruct this stream from the respondent through the deed by which the respondent conveyed the right of way for said railroad, and the petitioner having acquired such rights from its said predecessor, the respondent was not entitled to have such nuisance abated by injunction. This chancery cause was properly transferred to the Supreme Court of Appeals of West Virginia, and that Court held that the respondent had no right to abate this nuisance by a mandatory injunction because the obstruction was placed in the stream pursuant to an express contract between petitioner's predecessor and the respondent. See Mullens vs. Vgn. Ry. Co., 123 S. E. 287.

We therefore submit that petitioner has at all times, since it purchased said railroad, been under obligations, both legal and contractual, to abate the nuisance, if such it may be called, and having failed to do so it is liable for the damages suffered by the respondent on account thereof. It had more than ten years before federal control commenced within which to comply with this contract and abate this nuisance. Even if it had been actually prevented from compliance by the Government, during federal control, which it has not even attempted to show, it would still be liable because it had ample opportunity before that. At any rate, the Circuit Court of Wyoming County, West Virginia, held in this case that it was liable for the existence of the nuisance, and its decision in that regard was upheld by the highest Court of the State, and

that decision is final, because no federal question is involved.

IMMUNITY UNDER FEDERAL CONTROL.

The remaining question, if any, is whether the fact that the principal part of the washing of respondent's land was done during the period of federal control, relieves the petitioner of liability. If the mere fact that the cause of action arose *during* the period of federal control is sufficient to relieve the respondent of liability, as is contended by the petitioner, and as appears to be the holding of the District Court of the United States for the Eastern District of South Carolina, in the case of Baggot vs. Southern Railroad Company, 300 Federal 337, and no consideration is to be given to the language of order No. 50 of the Director General, providing that actions at law, etc., "based on contract, binding upon the Director General of Railroads, claims for death or injury to persons, or for losses and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation", and practically the same language in the transportation act of 1920, then it is not liable; but in so far as we have been able to find, this is the only case holding that if the cause of action arose during federal control, the Railroad Company is not liable, under any circumstance, without regard to whether the operation of the railroad contributed in any way to the injury complained of or not. The holding in this case is certainly at variance with and contrary to the holding in all other cases on this particular subject, both by the Federal and State Courts. This case was decided in 1924, but the District Court must have entirely overlooked the case of Cumberland Telegraph and Telephone Company vs. Lawrence, 271 Federal 81, decided Febru-

ary 22, 1921, by the Circuit Court of Appeals of the 5th Circuit. This action was brought by Lawrence against the Company to recover damages for the death of plaintiff's intestate, which was caused by the decedent coming in contact, on September 29, 1918, with a galvanized guy wire which the Company had erected in 1913, and had continuously maintained until its lines were taken over by the Government under the Federal Control Acts. The defendant urged that it was not liable, because, at the time of the injury, its property was in the hands of the Federal Government, but the Court held that the Company, having created the nuisance, it was liable for such consequences as might have reasonably been expected, but the Court did not pass on the question whether the Government was also liable on account of having continued to maintain it.

In the case of Hines vs. Woodson, 280 Federal 966, decided January 17, 1922, by the Circuit Court of Appeals for the 7th Circuit, which was an action brought by Woodson against the Wabash Railway Company and the Director General jointly, to recover damages done to plaintiff's land and crops by floods in 1919, during federal control, which floods were caused by brush and other debris drifting and clogging against a bridge erected by the Railroad Company a long time prior to federal control, the ruling of the District Court for the Eastern District of Illinois, holding that the Railroad Company was not liable and dismissing it, was reversed by the Circuit Court of Appeals which held that the Director General of Railroads is not liable for the flooding of land alleged to be due to obstruction of a stream by a bridge built by a Railroad Company many years before the Director General took control of its operation, and of the improper construction of which he was not given notice.

In the case of Brown vs. St. Louis and San Francisco Railway Company, 268 S. W. 679, decided by the Court of Appeals of Missouri on January 26, 1925, which was an action by Brown against the Railway Company to recover damages to the plaintiff's land and crops caused by the failure of the Railway Company to provide and maintain a sufficient opening under a bridge over a creek. The defendant's chief defense was that it was not liable because the overflow and damage accrued while its railroad was in charge of the Government, but the Court held that the defendant was liable, and after referring to numerous decisions, both State and Federal, in which the Courts have held that, for damages for personal injury and other causes arising out of negligence in the operation of the railroad, during the period of federal control, the suit is properly against the Governmental Agency, and the Railroad Company is not liable, because the Railroad Company had nothing to do with the operation of the railroad during that time, and was in no way responsible for what occurred, the Court in its opinion says:

> "This case is different. In this case the Railroad Company built and owned the road bed and that ownership remained during Governmental Control. If there was a defect in the original construction of the road bed, the Railroad Company was directly responsible for it and that responsibility remains until relieved, so the question in this case is whether Governmental Control and operation of the railroad absolved the owner thereof from liability in a case of this kind during the time the road was under the control of the Government and shifted that liability to the Government."

On a motion for rehearing, the Railroad Company called attention to and relied upon the case of Baggot vs. Southern Railroad Company, 300 Federal 337, but the

Court held that the holding in this case was in direct conflict with the holding of the Circuit Court of Appeals in the case of Cumberland Telegraph and Telephone Company vs. Lawrence, 271 Federal 89, which is cited and quoted hereinabove, and the Missouri Court followed the holding of the Circuit Court of Appeals.

In the case of L. & N. Ry. Co. vs. Tuttle, 258 S. W. 688, decided by the Supreme Court of Appeals of Kentucky on February 5, 1924, which was an action by Tuttle against the Railroad Company to recover damages resulting from failure of the Railroad Company to construct a reasonably convenient grade crossing, as required by a contract made prior to federal control, a portion of the damages claimed have accrued prior to the commencement of federal control, and a portion during federal control, the Court found that the Railroad Company had ample opportunity to comply with the contract, both before and after federal control, and held that the Railroad Company was liable for the damages accruing during federal control. In discussing the questions involved, the Court in its opinion says:

> "These are not cases where it is sought to hold a Railroad Company liable for a failure to perform a duty which could only be performed during the period of federal control, and which it then had power to perform. Not only were the contracts executed several years before federal control, but each of the crossings which the jury held were not reasonable and convenient was constructed many months before that time. During all this time the Company had abundant opportunity to comply with its contract, and it will not be heard to say that it was not responsible for the inconvenience accruing during federal control, where, if it had acted with any degree of promptness no such inconvenience would have resulted."

In the case of McPherson vs. Chicago, R. I. & Pac. Ry. Company and the Director General of Railroads, 203 Pac. 912, decided by the Supreme Court of Appeals of Kansas on January 7, 1922, which was an action to recover the costs and expense of the construction of a bridge, which formed part of the approach to a railroad crossing, and which bridge was washed away by a flood during federal control. It was contended by the Railroad Company that the judgment should have been against the Director General only, because the railroad was under federal control at the time the bridge was washed away, but the Court held that the judgment was properly against the Railroad Company, and, in its opinion, says:

> "This cause of action arose during federal control of railroads, but was not caused by that control, nor did the cause of action arise out of such control. The obligation that is sought to be enforced arose when the railroad was built, has existed continuously from that time to the present, and no reason has been shown why the judgment was not properly rendered against the Railroad Company."

The Supreme Court of New York County, in January 1919, rendered a similar decision in the case of Morris Avenue Bridge vs. New York Central Railroad Company, 174 N. Y. Supp. 682.

We deem it unnecessary to argue the proposition that, although the one who constructs a nuisance may be liable for the injurious effects resulting therefrom, yet one who purchases the ground on which the nuisance exists is also liable providing he maintains it with knowledge of its continuous or intermittent injurious effects, as the petitioner did in this case, nor do we deem it necessary to argue the proposition that, aside from the obligation of the contract, the petitioner had actual knowledge of the

existence of this nuisance and its evil effects, and its duty to abate the nuisance existed from the time it acquired the railroad, and it makes no difference whether the Director General was also liable or not. If the petitioner had knowledge of the existence of the nuisance, it was its duty to abate it, whether it was required to do so by way of a formal notice from the respondent or not, because formal notice to abate is unnecessary where knowledge exists.

The case of Atlantic Coast Line Ry. Co. vs. Southern Cotton Oil Mills, 129 Va. 323, 106 S. E. 337, and Reno vs. Seaboard Air Line Ry Co., 120 S. C. 7, 112 S. E. 439, are not in conflict with any of the cases hereinabove cited, because the only question passed upon in those cases was whether the Director General had maintained the nuisance that had been created by the Railroad Company with knowledge of their existence, and was therefore liable for the injuries caused. This is all that is held in either of the cases. In neither of them does the Court hold that the Railroad Companies were not also liable. The rule that the creator of a nuisance and the person who maintains it with knowledge of its existence and its evil effects are both liable is so well ectablished that we deem it unnecessary to cite any additional authority.

We therefore submit that the judgment of the Circuit Court of Wyoming County, West Virginia, is correct, that the action of the Supreme Court of Appeals of West Virginia in refusing to review this judgment is correct, and that the judgment should be affirmed by this Court.

J. Albert Toler,
Mullens, West Virginia.
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 163.—October Term, 1925.

Virginian Railway Company, Petitioner, vs. A. J. Mullens.	On Writ of Certiorari to the Circuit Court of Wyoming County, West Virginia.

[May 24, 1926.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This was an action in a state court in West Virginia to recover for injuries to the plaintiff's land resulting from a nuisance alleged to have been created and maintained by the defendant. The action was begun June 14, 1921. The case stated in the complaint was to the effect that the defendant constructed in 1906, and operated up to the time of suit, a railroad through West Virginia, a short section of which was located on a right of way acquired for the purpose and extending laterally into a natural stream bounding the plaintiff's land; that this section was constructed by filling in and building up the outer part of the bed of the stream opposite his land and placing the track on the embankment so made; that the embankment and track narrowed the former channel, crowded the current against the bank on the plaintiff's side and exposed his land to overflow and injury; and that on divers occasions thereafter, particularly in the years 1916 and 1919, this obstruction caused the waters to wash away portions of the bank and to overflow and injure his land.

The defendant interposed a plea putting in issue the allegations in the complaint, and by a further plea insisted that the road was under federal control from December 28, 1917, to March 1, 1920, and that no liability attached to the defendant for such of the injuries as occurred during that control.

The trial resulted in a verdict and judgment for the plaintiff; and the Supreme Court of Appeals of the State, although petitioned by the defendant to review the judgment, declined so to

do, thus making the trial court the highest court of the State in which a decision could be had. *American Ry. Express Co.* v. *Levee*, 263 U. S. 19. The case is here on writ of certiorari; and the question presented is whether there was error in holding the defendant liable for injuries done during federal control.

The case shown by the evidence differed from that stated in the complaint. Affirmatively and without dispute the proofs disclosed that the railroad was not constructed by the defendant, but by another railway company, and was purchased by the defendant in 1907, after it was completed and in full operation; that after the purchase the defendant used the embankment and track in the bed of the stream as an integral part of the road, just as it was used before; that the plaintiff, although familiar with the situation, made no complaint of this use or of the presence of the embankment and track in that place; that on December 28, 1917, the United States took possession of the railroad and its appurtenances, and from that time to March 1, 1920, operated and controlled the same to the exclusion of the defendant; that during such operation and control the United States exercised the usual rights of an owner by altering parts of the road-bed, widening tunnels, laying double tracks along parts of the road and using the property as best suited the government's purposes. As respects the section in the bed of the stream the evidence showed that the United States made no change therein but continued the use theretofore made of it as part of the road. And as respects the injuries done to the plaintiff's land the evidence, taken most favorably to him, disclosed that, while there was some cutting of the bank on his side soon after the road was constructed and also during the defendant's possession and operation, the chief injuries occurred in February, 1918, and July, 1919, during federal control, when in the course of two unusual freshets portions of the bank were washed away and his land was overflowed and materially injured.

At the conclusion of the evidence the defendant, relying on acts of Congress and proclamations of the President bearing on the federal control, requested the court to charge the jury that the defendant was not liable for the injuries occurring during such control and that as to them the finding and verdict must be for the defendant. But the request was refused and the defendant ex-

cepted. If the request was well grounded in law, its refusal was plainly prejudicial.

While the evidence may have admitted of a finding that the embankment and track in the bed of the stream tended to obstruct and divert the current in such way as to constitute a nuisance, it affirmatively and indubitably precluded a finding that the defendant constructed them or did more than use them as an integral part of a completed road which it had purchased as a going concern from a prior owner. Thus there was no basis on which the defendant could be charged with liability as the creator of the nuisance. If liable at all, it was liable only because it continued the use to which the embankment and track were put by its grantor. There has been much contrariety of decision in the courts of the several States as to whether a purchaser who merely continues a prior use of such a structure may be charged, at the instance of one who has made no complaint or objection, with liability for maintaining a nuisance. The question ordinarily is one of local law to be resolved according to local decisions; and out of deference to the action of the court below we assume that in West Virginia a complaint or objection is not deemed essential, although no decision on the point by the Supreme Court of Appeals has been brought to our attention. But here it was insisted and the proofs conclusively established that the defendant's use ceased when federal control began, and that the chief injuries occurred during the period of that control. The questions of the defendant's legal relation to the road and the operation thereof while under federal control and of its liability for injuries occurring during that period involved a consideration of the nature of that control and of the operation and effect of federal statutes and proclamations bearing on the subject. In short, they are federal questions.

By the Act of August 29, 1916, c. 418, 39 Stat. 645, Congress empowered the President, in time of war, to take possession and assume control of transportation systems and to utilize the same in the transportation of troops, war material and equipment, and for other needful or desirable purposes incident to such an emergency. War with Germany was declared April 6, 1917, and with Austria-Hungary December 7, 1917; and in both instances Congress pledged all of the resources of the country to bring the con-

fliet to a successful termination, 40 Stat. 1 and 429. Under a proclamation declaring his purpose so to do, 40 Stat. 1733, the President took possession and assumed control, at noon on December 28, 1917, of various systems of transportation, including the defendant's railroad and the appurtenances thereof, to the end that they might be operated and utilized in transporting troops, war material and equipment, and in performing other service in the national interest; and he committed the possession, control, operation and utilization of such systems to a Director General designated by him for the purpose. By the Act of March 21, 1918, c. 25, 40 Stat. 451, Congress confirmed the President's action in thus taking over the transportation systems; made provision for continuing such federal control under the President's direction, and empowered him to exercise his authority in that regard through agencies of his selection. In General Order No. 50 issued October 28, 1918, (U. S. R. R. Administration Bulletin No. 4, Revised, 334), which recited that suits were being brought against railroad companies, the roads of which were under federal control, on causes of action arising during such control for which the companies were not responsible, it was directed that actions and suits based on claims for injuries to persons, damage to property, etc., growing out of the possession, use, control or operation of any railroad by the Director General be brought against that officer, and not otherwise.

We heretofore have considered the legislation, proclamation and order just recited and have held that they provided for a complete possession by the United States and contemplated a single and effective control by federal authority to the exclusion of the private owners, *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S. 135, 148; and that during federal control "no liability arising out of the operation of these systems was imposed by the common law upon the owner-companies as their interest in and control over the systems were completely suspended," *Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554, 557. In the latter case the contention was made that the Act of 1918 should be construed as subjecting the companies to liability for acts or omissions of the agency exercising federal control, notwithstanding they were deprived of all power over the properties, because the just compensation to be paid to them would include any loss resulting to

them from such liability. But this Court disposed of the contention by saying (p. 559): "Such a radical departure from the established concepts of legal liability would at least approach the verge of constitutional power. It should not be made in the absence of compelling language. There is none such here." And, turning to a provision in the Act of 1918 declaring "carriers while under federal contral" liable and suable, the Court said (p. 559): "Here the term 'carriers' is used as it is understood in common speech, meaning the transportation systems as distinguished from the corporations owning or operating them"; and (p. 561): "This means, as matter of law, that the Government or its agency for operation could be sued, for under the existing law the legal person in control of the carrier was responsible for its acts. . . . All doubt as to how suit should be brought was cleared away by General Order No. 50, which required that it be against the Director General by name." In *Wabash Ry. Co.* v. *Elliott*, 261 U. S. 457, 462, the decision was to the same effect. In *North Carolina R. R. Co.* v. *Lee*, 260 U. S. 16, it was held that the Government operated the railroads during federal control "not as lessee, but under a right in the nature of eminent domain"; and in *Dupont de Nemours & Co.* v. *Davis*, 264 U. S. 456, 462, it was added that "In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war measure."

In principle these decisions are determinative of the question here presented. They show that federal control did not rest on a conventional arrangement with the owner-companies, but on an exertion of supreme governmental power, and that the legislation, proclamation and order before recited contemplated a complete separation of the companies from the roads while under such control, and an absence of responsibility by the companies for losses and injuries resulting from the use, operation and maintenance of the roads during that period.

When the United States took over this road the embankment and track in the bed of the stream were taken over as part of it; and the defendant was deprived of all power over them while they remained under federal control. Their maintenance and use during that period were exclusively in the hands of federal agents. If a duty rested on anyone to make any change in them it rested

on the federal agents; and if maintaining and using them without change was a wrong against the plaintiff it was a wrong committed by those agents, for which no liability attached to the defendant.

The plaintiff relies on cases holding the creator of a nuisance liable for injuries resulting therefrom after he had transferred the premises to another by deed or lease; but they are not in point. They proceed on the theory that by such a transfer the creator expressly or impliedly affirms the right of the transferree to continue the prior situation or use, and also voluntarily disables himself from correcting or abating the same. Here the defendant had neither created the nuisance nor made a voluntary transfer of the premises. The United States, as we have seen, came into possession not as a conventional transferree, but by an exercise of governmental power in which the defendant had no voice.

The plaintiff also seeks to support the judgment on the theory that the defendant company was under a contract obligation to protect his land from injury, and to make out that obligation he refers to a clause in the deed whereby the defendant's grantor acquired the right of way and to a clause in the deed whereby the defendant afterwards acquired the completed road. But he is not in a position to urge this contention here. The case stated in the complaint was distinctly in tort. There was no mention of a contract obligation; nor any reference to either of the two deeds. And when the court came to charge the jury the plaintiff tendered and the court included in its charge various instructions wherein the case was treated, in keeping with the complaint, as one to recover damages for an alleged tortious creation and continuance of a nuisance. After bringing and trying the case on that theory the plaintiff cannot be permitted on this review to change to another which the defendant was not required to meet below. Other objections to the contract theory are suggested but they need not be considered.

We conclude that the court should have instructed the jury, as it was requested to do, that the defendant was not liable for the injuries occurring during federal control.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.